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Wisconsin. Supreme Court

WISCONSIN REPORTS

157

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MAY 1 — JUNE 17, 1914

FREDERIC K. CONOVER
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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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MEMORANDUM.

Mr. Justice SIEBECKER took no part in the decision of the cases reported in this volume on pages 1 to 72, 107 to 120, and 455 to 461.

ERRATA.

VOL. 156.

Page 359, line 18. For 22 Wis. 24, read 22 Wis. 234.

Page 360, line 3. Same correction.

Page 409, lines 4–8 should read:

For the appellants the cause was submitted on a brief signed by *J. E. & J. F. Malone.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *Paul O. Husting,* of counsel and oral argument by *F. L. McNamara.*

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4 *id.* 61 - - - - - 238
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32 *id.* 517 - - - - 238
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2 Jones, Liens (2d ed.) § 1239 - - - - 116

3 Kansas Law Jour. 369 - 238

1 Labatt, Master & S. (2d ed.) 379 - - - 119, 120

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4 *id.* p. 3753, § 1281, note 4 238
4 *id.* p. 3674, § 1283, note 6 238

1 Thompson, Comm. on Neg. § 581 - - - - 535
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1 Tiffany, Landlord & T. § 64 - - - - - 155

8 Washington Law Rep. 49 238
13 *id.* 652 - - - - 238
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5 Western Law Jour. 193, 289 - - - - - 238
4 Wisconsin Legal News, 380 238
Wood, Master & S. (2d ed.) secs. 4–6 - - - - 115
3 Words & Phrases, 2853 - 459

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CASES DETERMINED

AT THE

January Term, 1914.

WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Appellant, vs. CITY OF MENASHA, Respondent.

December 9, 1913—May 1, 1914.

Public utilities: Construction of statutes: Indeterminate permits: Abrogation of existing franchises: Constitutional law: Impairment of contracts: Estoppel: Right of city to do commercial lighting: Certificate of convenience and necessity, when required.

1. The Public Utilities Law was framed upon the theory that the duplication of plants for the carrying on of certain kinds of business was undesirable because it resulted in economic waste, the loss from which in the end usually fell upon the consumer; and in construing the act the apparent purpose of the legislature should be kept in mind.
2. Ch. 596, Laws of 1911,—which provided that every franchise theretofore granted to a public utility by the state or any municipality was so altered as to constitute and be an indeterminate permit within the terms and meaning of secs. 1797*m*—1 to 1797*m*—108, Stats., and subject to all the terms, provisions, conditions, and limitations of said sections,—had the effect to abrogate a pre-existing franchise granted to a public utility by a city, at least so far as the provisions of the sections referred to were inconsistent therewith.
3. By force of said act of 1911, sub. 3 of sec. 1797*m*—74, Stats.,—which prohibits any municipality from constructing a competing plant where there is a public utility already in operation under an indeterminate permit, engaged in similar service in such municipality, without first obtaining a certificate of necessity from the railroad commission,—became part and parcel of the franchise of a public utility then operating under authority of a municipality; and a provision in the municipal franchise whereby the city reserved to itself the right to do a commercial lighting business was abrogated.

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4. The abrogation of such provision did not violate the constitutional inhibition against impairing the obligation of contracts, and was valid.
5. The legislature having power to enact such statute, the public utility is not estopped by anything contained in its former franchise, or by any waiver contained in its acceptance thereof, from claiming the benefit of any rights given by the substituted franchise.
6. A city in lighting its streets and public buildings performs a governmental function, while in supplying light to private consumers it performs a proprietary or private function. The two kinds of business are separate and distinct.
7. Where a city was engaged in the business of public lighting only when ch. 596, Laws of 1911, went into effect, and another public utility was at the time engaged in the business of commercial lighting under a municipal franchise which reserved to the city the right to do a commercial lighting business whenever it chose, the city could not thereafter avail itself of such reserved right without first obtaining a certificate of convenience and necessity from the railroad commission, under sec. 1797*m*—74, Stats.
8. The mere fact that the city had furnished a few lights to one private store building and one residence for a short time, the service being then discontinued because the city was unable to generate the necessary current, did not make the city a public utility doing a commercial lighting business, so as to exempt it from the provisions of sec. 1797*m*—74, Stats., where it had wholly ceased to do any private lighting for more than three years before the passage of the act of 1911.
9. The facts that the city, when it constructed its street lighting system, intended at some future time to embark in the business of commercial lighting, that some part of the equipment (such as the poles) could be used in that business, and that prior to the passage of ch. 596, Laws of 1911, it had declared its purpose to enlarge its plant so as to enter that field, no funds having yet been provided or expense incurred therefor, did not take the case out of the statute so as to render a certificate from the railroad commission unnecessary. *Neacy v. Milwaukee*, 151 Wis. 504, distinguished.

TIMLIN and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

In the year 1904 the plaintiff was a public-service corporation and was engaged, among other things, in the business of

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furnishing light and electric energy to municipalities and private consumers. On March 23d of this year the defendant granted plaintiff a franchise to erect poles and string wires thereon in the city and to furnish electric light and power to those desiring to use same. The franchise specified the rates to be charged for current for incandescent and arc lamps and for power. In the ordinance the city reserved the right to erect and maintain a competing plant for private lighting. It was expressly provided that the ordinance should not become effective unless within thirty days after its passage and publication the same was accepted and an express waiver was filed with the city clerk of all rights the plaintiff might have to object to the establishment of a commercial lighting plant by the city. Such acceptance and waiver were filed. The plaintiff constructed the necessary lines to supply private consumers and also furnished current for street lighting until the city constructed a plant of its own for this purpose.

About September 27, 1905, the city council passed a resolution reciting that it appeared that electric light could be furnished to the city of *Menasha* for the use of said city and its inhabitants more economically and with better service than the same was then being supplied and that in the judgment of the council such light could be most economically supplied by works owned by the city and that the best interests of the city called for the building of said works. The resolution further recited that it appeared from estimates obtained by the council that such works could be built at a cost of not exceeding $10,000, and, it appearing that the city had power under ch. 143 of the Laws of 1901 to build such works, it was resolved that the city build light works to supply the city and its inhabitants with light. A special election was provided for to vote on the proposition, and it was carried by a large majority.

On November 28, 1905, the city notified the plaintiff that it was about to install a plant to light its streets, but that such plant would not be ready for sixty days, and that in the mean-

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time it would expect the plaintiff to continue lighting the streets according to the terms of its franchise. On January 2, 1906, the plaintiff was notified to cease furnishing current to the city thirty days thereafter. Since February 1, 1906, the city has done its street lighting. Whatever may have been the expectations of the city in respect to the adequacy of its plant, it proved to be wholly inadequate to supply current for commercial lighting. The building was built large enough to accommodate an additional engine for light work. It was thought after the plant was built that it had sufficient capacity to supply private consumers with light to some extent; so about June, 1906, a resolution was passed authorizing the committee on water and light to make immediate arrangements for supplying private consumers with light and for entering on a commercial lighting business in the city of *Menasha,* and for such purpose it was instructed to procure the necessary transformers and other equipment. In pursuance of this action about 620 feet of wire for commercial lighting was strung in 1906, and a small amount of current was for a time supplied to two or three private consumers. A fourth was supplied for a couple of days, but service was discontinued because of lack of power to generate the necessary current.

The plant installed consisted of a generator, switchboard, and necessary transformers and poles, the number of transformers purchased not exceeding three. The wires for private lighting were strung to the store building used by the then mayor, and also to the upstairs of the building, and to the residence of the mayor's partner some twenty feet from the store. The number of lights was from fifteen to twenty-five, and the revenue received therefrom was about $30. The service was begun about the middle of the year 1906 and discontinued about June, 1908, because the plant was unable to furnish the current. The machinery used seems to have been installed in the waterworks plant, and it rather appears by inference that the engine used for the pumping plant was

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used to generate electricity also. From June or July, 1908, until the latter part of the year 1911 the city furnished no light to any private consumer.

On February 21, 1911, the city passed a resolution to borrow $40,000 to be used for the purpose of enlarging its lighting plant. On July 18, 1911, the city authorized the purchase of additional equipment for its lighting plant, and on October 19, 1911, it passed an ordinance providing for the issuance and sale of bonds to the amount of $40,000 to purchase additional equipment for the plant. The bonds were sold and the city proceeded to provide the necessary equipment to engage in the commercial lighting business. The plaintiff brings this action to restrain the city from so doing, and from a judgment in defendant's favor it prosecutes this appeal.

For the appellant there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *Clarke L. Rosecrantz.* They cited *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; *Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131; *Cawker v. Meyer,* 147 Wis. 320, 133 N. W. 157.

For the respondent there was a brief by *D. K. Allen,* attorney, and *Silas Bullard,* of counsel, and a separate brief by *Henry Fitzgibbon,* of counsel; and the cause was argued orally by *Mr. Fitzgibbon* and *Mr. Allen.*

The following opinion was filed February 3, 1914:

BARNES, J. For many years prior to 1907 the plaintiff was a public utility. It did not elect to surrender its franchises and to take in lieu thereof the indeterminate permit provided for by the Public Utilities Law of 1907 (ch. 499), sec. 1797*m*—1, Stats., and succeeding sections.

Ch. 596, Laws of 1911, was published and became effective on July 8, 1911. This act in effect provided that any franchises theretofore granted to a public utility by the state or through any of its agencies was so altered and amended as to

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constitute and be an indeterminate permit within the terms and meaning of secs. 1797*m*—1 to 1797*m*—108, inclusive, of the Statutes of 1898, and subject to all the terms, provisions, conditions, and limitations of said sections. The amended franchise is given the same force and effect as a license, permit, or franchise granted after July 11, 1907, to any public utility subject to the provisions of the Public Utilities Law of 1907.

Sub. 3, sec. 1797*m*—74, Stats., being part of the Public Utilities Act, provides:

"No municipality shall hereafter construct any such plant or equipment where there is in operation under an indeterminate permit as provided in this act, in such municipality a public utility engaged in similar service, without first securing from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require such municipal public utility."

The appellant contends that by force of said ch. 596, Laws of 1911, it received an indeterminate permit in lieu of the existing franchises under which it operated, and became subject to the Public Utilities Law to the same extent that it would have become subject thereto had it surrendered its franchises under the 1907 law and elected to receive in lieu thereof an indeterminate permit as provided by ch. 499, Laws of 1907 (sec. 1797*m*—77). The plaintiff being subject to the Public Utilities Act after July 8, 1911, it insists that it was unlawful for the defendant city to engage in the business of commercial lighting after that date without a certificate of convenience and necessity from the railroad commission, and it is conceded that no such certificate was procured and it appears by inference that none was asked for.

The defendant insists that it had the right to proceed without any certificate from the railroad commission, for the following reasons:

(1) The clause in the franchise granted the plaintiff in 1904 by which the defendant expressly reserved to itself the right to engage in the business of commercial lighting is still

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in force, and in any event, the plaintiff having accepted such franchise with the provision referred to, it should not now be heard to object to the right of the city to exercise the privilege so reserved.

(2) By a resolution passed February 21, 1911, the city, as it had the right to do at that time, evinced an intention to enlarge its plant so as to engage in the business of commercial lighting, and it should be held that thereafter the city became a public utility in the business of commercial lighting.

(3) The city was in fact a public utility engaged in the commercial lighting business since the summer of 1906, and therefore it was not affected by ch. 596, Laws of 1911.

The circuit judge held in substance that there was a contract between the parties by which it was agreed that the city might at any time engage in the commercial lighting business; that the obligation of this contract could not be impaired, although the legislature might prohibit the city from building a lighting plant; that the contract was not affected by ch. 596, Laws of 1911, and that under the provisions of the ordinance of 1904 referred to the plaintiff was estopped from claiming that the city did not have the right to engage in the commercial lighting business. The trial judge also said he was inclined to think the position was well taken that the city was a public utility engaged in the business of commercial lighting long prior to the passage of the act of 1911.

The Public Utilities Law was undoubtedly framed on the theory that certain kinds of business were of such a character that the duplication of plants for the purpose of carrying them on was undesirable because it resulted in an economic waste, the loss from which in the end usually fell upon the consumer. As to some kinds of business, such as that of operating telephone lines, duplication is not only an added expense to the user, but is apt to be a positive nuisance. Competition in the public utility business in our cities in the end generally resulted in consolidation or an agreement between competing companies as to the rates to be charged. In either

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event the rates were usually adjusted so as to cover fixed charges and to yield a return on the cost of constructing the competing plants. These are matters of common knowledge. One of the main purposes of the law was to avoid duplication, and it was thought that by efficiently controlling the rates to be charged by a single utility the consumer would derive the benefit resulting from economy in production. In construing the Public Utilities Law the apparent purpose of the legislature should be kept in mind.

When ch. 596, Laws of 1911, was passed, it took from the plaintiff some rights and privileges which it had and conferred some privileges on it which it did not have. It also conferred some rights on municipalities in regard to acquiring existing plants which they did not before have. After the passage of this act, sub. 3, sec. 1797*m*—74, above quoted became part and parcel of the plaintiff's franchise.

The main propositions upon which this case was decided by the lower court would seem to be untenable under our decisions. In brief it was held in *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530, that when a public utility comes under the 1907 law it surrenders its existing franchise and that its rights and liabilities are then fixed and determined by the provisions of the Public Utilities Act. The writer of this opinion did not agree with the decision in the *La Crosse Case,* but has no doubt that where there is an express provision in the Public Utilities Law which is inconsistent with a provision contained in the franchise surrendered, the latter is abrogated. The quoted section of the Public Utilities Act is inconsistent with the provision of the 1904 ordinance granted to the plaintiff upon which the defendant relies; so the case here made by the plaintiff is stronger than that made by the defendant in the *La Crosse Case.* It is also decided in this latter case and in other cases that the provision of the 1904 ordinance relied on might be abrogated by the legislature. An agreement by which a city reserved the right to do a commercial lighting business has no

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more of the essence of a contract protected by the constitution than one whereby the city was entitled to receive a license fee for the use of its streets, which was the question involved in the *La Crosse Case,* or one by which an interurban railway company agreed not to exact to exceed a certain rate of fare, which it was held did not deprive the legislature of the right to regulate rates in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925. What was said in the *La Crosse Case* in reference to the effect of taking an indeterminate permit was approved in *Calumet S. Co. v. Chilton,* 148 Wis. 334, 356, 135 N. W. 131. The language of sub. 3, sec. 1797*m*—74, positively inhibits a municipality from constructing any plant or equipment where there is in operation under an indeterminate permit a public utility engaged in a similar service, without first procuring a certificate of convenience and necessity from the railroad commission. The plaintiff, after July 8, 1911, fully answered the calls of the statute, and the defendant had no right to proceed without the certificate unless prior to that date it had constructed a plant or equipment to engage in the business of commercial lighting within the meaning of the statute.

The argument is made that because the plaintiff accepted a franchise reserving to the city the right to engage in the commercial lighting business, it is now estopped from asserting that the city has no such right. The argument is not convincing. The plaintiff was apparently satisfied with its franchise. It might have voluntarily surrendered it and taken an indeterminate permit, but it did not see fit to do so. So long as it retained its original franchise the city had a perfect right to engage in the commercial lighting business. The legislature, however, intervened and took away the existing franchise of the plaintiff and substituted another for it. Plaintiff could no longer claim the benefits of its former franchise, and it would hardly seem fair to impose on it the burdens imposed by the old franchise, which were expressly taken away by the new. The state substituted a franchise of its

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own making for one upon which the parties had agreed between themselves. Conceding that the power to do this existed, it is difficult to see how the plaintiff should be held estopped from claiming the benefits of any rights given by the substituted franchise.

The main contention of the respondent, as stated by its counsel, is that on July 8, 1911, and for a long time prior thereto the defendant was a public utility doing a commercial lighting business and therefore was not affected by ch. 596, Laws of 1911. The facts upon which this claim is based have been fully set out in the statement of facts.

A city in lighting its streets and public buildings is performing a governmental function. It is not liable for the negligence of its servants in performing that duty. On the other hand, when a city engages in the business of supplying light to private consumers, it is performing a proprietary or private function, and it is liable for the negligence of its servants. *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730; *Evans v. Sheboygan,* 153 Wis. 287, 141 N. W. 265, and cases cited. The two kinds of business are separate and distinct. 1 Dillon, Mun. Corp. (5th ed.) § 109; *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 89 N. W. 542.

There can be no doubt that when the city built its original plant it was built for the purpose of lighting the streets, and possibly the public buildings owned by the city. It was built in the exercise of a governmental function. The resolution adopted was broad enough to cover both kinds of lighting, but the plant constructed was wholly inadequate for the dual purpose. It appears from the evidence of one witness that the building in which the equipment was placed was large enough to accommodate another light engine. Other evidence indicates that the equipment was placed in the waterworks building. After the plant had been running a few months it was thought that some private lighting could be done, so wires were run some six or seven hundred feet to

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the store building of the mayor, and that was lighted on the first and second floors, as well as the dwelling house of the mayor's partner, located about twenty feet from the store. These lights were discontinued about the middle of the year 1908, because the city was unable to generate the necessary current to run them. Thereafter for a period of more than three years before the passage of ch. 596, Laws of 1911, no private lighting was done by the city. In addition to the private lighting done as above stated, the city furnished current for two days in 1906 or 1907 to one other consumer, but was obliged to quit because it could not generate the necessary current. The original proposed expenditure for a lighting plant was only $10,000. No doubt the poles used for public lighting might also be used in connection with the business of private lighting, and possibly some of the other equipment. The only equipment which the city appears to have had which was not an essential part of the public lighting plant consisted of two or three transformers, two or three poles, and six or seven hundred feet of double wire. These were procured or constructed in connection with the lighting of the mayor's store building and the residence of his partner.

Under the facts stated we do not think the city was a public utility engaged in the business of commercial lighting at any time prior to July, 1911. According to the census of 1905 the city of *Menasha* had a population of 5,960. The furnishing of a few lights to one store and one residence for a short time, we do not think made the city a public utility under the doctrine of *Cawker v. Meyer,* 147 Wis. 320, 133 N. W. 157. However this might be, the city had ceased to perform any function as a public utility for more than three years before the passage of the 1911 act.

It is true that the action of the city in 1911 contemplated the enlargement of the existing plant, but the purpose of making the enlargement was to enable the city to embark in a new and independent business, to wit, that of furnishing commercial light in its private or proprietary capacity. To

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this end bonds to the amount of $40,000 were sold. Nothing, however, was done toward extending the plant or voting the bonds therefor until after July 8, 1911, except that on February 21, 1911, the council passed a resolution which amounted to a declaration of intention to enlarge the existing plant so as to engage in the business of commercial lighting.

After July 8, 1911, the plaintiff was a public utility operating under an indeterminate permit and furnished light to the inhabitants of the city of *Menasha.* The city was not and had not been engaged in this business for at least three years, and we think never had been engaged in such business. Under the statute quoted the city was prohibited from "constructing any plant or equipment" for the purpose of engaging in the field occupied by the plaintiff, without the consent of the railroad commission. When the original plant was constructed, it may have intended and probably did intend to embark in the commercial lighting business at some future time, but it did not do so or take any steps in that direction until after July 8, 1911.

Respondent's counsel argue that under the decision in *Neacy v. Milwaukee,* 151 Wis. 504, 139 N. W. 409, the city became a public utility for the purpose of engaging in the lighting business prior to July 8, 1911. The cases are very dissimilar in their facts. Five years before the Public Utilities Law was passed, the city of Milwaukee determined to erect a municipal lighting plant and voted bonds for that purpose in 1904. It was tied up by various proceedings in the courts, but in 1906 it issued bonds for this purpose to the amount of $150,000 and purchased a site for $60,000. Before the Public Utilities Law was passed the city expended other large sums of money for and in connection with the construction of an electric light plant. Under these circumstances it was perhaps inferentially held in the *Neacy Case* that a certificate from the railroad commission was not necessary, because the city had reached a definite conclusion to build, had provided the necessary funds therefor, had pro-

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cured its site, and was building as rapidly as it could before the Public Utilities Law was passed and when it had a perfect right to proceed without any certificate of convenience and necessity. About all that can be said in the instant case is that the city from 1905 on and prior to July 8, 1911, evinced an intention to embark in the commercial lighting business at some indefinite time in the future, and that it had made some trifling expenditures in connection with the lighting of the store building and residence referred to. No definite steps were taken to enter the private lighting field and no funds were provided for that purpose until after July 8, 1911. It is reasonable enough to say that sub. 3, sec. 1797*m*—74, was not intended to prevent the completion of a plant where the construction of one was well under way when the law was passed. We think it would not be a reasonable construction of it to hold that mere intention to build a plant would be sufficient to render the law inapplicable.

State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co. 145 Wis. 337, 129 N. W. 600, has some bearing on the question. There the city entered into a contract with the street railway company to do its lighting, and the latter expended a considerable sum of money to provide the necessary equipment to carry out its contract. Before the city succeeded in passing an ordinance granting the street railway company the right to place its poles and wires in the streets, the Kenosha Gas & Electric Company surrendered its franchise and took the indeterminate permit provided for by the Public Utilities Law, and it was held that the ordinance passed after such surrender was void and that the street railway company acquired no rights thereunder. The fact that a preliminary contract was entered into and considerable expenditures were made thereunder before the competing utility took an indeterminate permit was not considered sufficient to deprive it of the benefits conferred by sub. 1, sec. 1797*m*—74.

The respondent no doubt constructed its plant in the best of faith. We realize that this decision leaves it in an unfor-

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tunate predicament. We think the law is reasonably plain, and, thinking so, it is not for us to undertake to amend it or to defeat the legislative will by indulging in a strained construction of it. Our duty is to declare the law as it is written. If it deals harshly with the defendant, it has its remedy before the railroad commission or the legislature. Where a city builds a plant adequate only for the purpose of doing its own lighting, but intends to enter another field of operation in the indefinite future, we do not think it can reasonably be said that because of such intention and because a small portion of the equipment in use may also be useful in the new operation, it is in fact engaged in such new operation. We cannot escape the conclusion that prior to July 8, 1911, the city had built and was operating a plant to do its own lighting, and that thereafter it provided the necessary funds and proceeded in its proprietary capacity to provide a plant to furnish commercial lighting, and that in doing so without a certificate of convenience and necessity from the railroad commission it was constructing and equipping a commercial lighting plant in violation of sub. 3, sec. 1797*m*—74, because there was already a public utility operating such a plant in the city under an indeterminate permit.

By the Court.—Judgment reversed, with directions to enter judgment in accordance with this opinion.

TIMLIN, J. (*dissenting*) It is uncontroverted that the defendant city took all the legal steps necessary to establish its right and power to build a lighting plant to supply the city and the inhabitants thereof with light under ch. 143, Laws of 1901. These steps were taken and the plant built and in operation long prior to July 8, 1911, when the plaintiff became the owner of an indeterminate permit. The city had acquired and built the plant and the plant was in operation during 1906, to say the least. It is argued that the city did not at once or did not prior to July 8, 1911, efficiently equip this plant for both kinds of lighting, but confined its work to

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municipal lighting, and that its efforts at commercial lighting were few and feeble. I regard this part of the argument of counsel as immaterial, mere dust-throwing with the effect of obscuring the real point.

We start out with the proposition that the city had a lawful charter for both kinds of lighting, had its site purchased and its plant in operation for municipal lighting, waiting, as it lawfully might, before making the additional outlay for further extension. That the city never abandoned its rights so acquired is uncontroverted, and is further shown by the express contract with plaintiff with reference to this condition, recognizing the right and power of the city to enlarge its plant for the purpose of commercial lighting. The real significance of this stipulation is to show that there was no abandonment by the city, but a mere *ad interim* authority given to the plaintiff, a passerby, an interurban railway with no plant in the city but carrying a current through the city, to do commercial lighting until such time as the city should further enlarge its plant acquired for that purpose. I think the city lost no rights which it had acquired under ch. 143, *supra,* by delaying to extend its activities to commercial lighting under such circumstances. It did not if a city has the same rights under ch. 143, *supra,* as corporations organized for private gain have. Such as street railways under sec. 1862, Stats. (*Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791), or such as an electric company has under sec. 1797*m*—74 (*Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131). In the case last cited it is said at page 367:

"Excusable, temporary suspensions, involving no purpose to abandon, the owner being willing and seasonably, under the circumstances, able to resume and doing so, as in this case, satisfies the calls for a 'public utility operating under,' etc."

Municipal corporations should not lightly be held to have abandoned their charter powers, nor should statutes conferring power upon such corporations to acquire and operate property in their proprietary capacity be considered repealed

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by implication or modified by any loose construction of subsequent statutes after the city has invested its money in such property. I regard the rights of the city as fixed prior to July 8, 1911, and think this case should be ruled by the principle deducible from *Neacy v. Milwaukee,* 151 Wis. 504, 139 N. W. 409. The city was therefore not required to obtain a certificate of convenience and necessity from the railroad commission. The legislative intention that such was the law prior to July 10, 1913, and therefore applicable to this case, is persuasively indicated by the enactment of ch. 621, Laws of 1913 (sec. 1797*m*—74*n*).

I am authorized to say Mr. Justice KERWIN concurs in this dissent.

A motion for a rehearing was denied, with $25 costs, on May 1, 1914.

ILLINOIS STEEL COMPANY, Appellant, vs. BUDZISZ and wife, Respondents.

January 13—May 1, 1914.

Adverse possession: Presumptions: Abandonment by lessee: Assignment of lease: Evidence: Baptismal records.

1. Evidence which tended to show, among other things, that a lessee of premises, being involved in debt, suddenly left the state and never came back; that creditors who had loaned him $200, and who were not shown to have had any knowledge of the lease, thereupon took, for the debt, a house which the lessee had built, and thereafter claimed the premises as their own, inclosed them with a fence, made other improvements, and finally sold the property or part of it; and that they and their successors occupied the premises continuously for more than twenty years, is *held* to sustain a finding by the jury that the lessee had abandoned all claim to the property before the creditors entered thereon, and to rebut any presumption that they held under an assignment of the lease or were tenants of the lessor.

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2. The continuous occupancy of the premises by said creditors and their successors for more than twenty years before the commencement of an action by the true owner, raised a presumption that their possession was adverse.

[3. Whether or not a church baptismal record was competent evidence of the date of a child's birth, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The plaintiff sues in ejectment and claims through paper title. The defendants claim title by adverse possession for twenty years prior to June 30, 1897, the time of commencement of this action. The jury returned the following verdict:

"(1) Did Hering or Hering and wife enter upon and occupy the premises described in the complaint actually and continuously until they sold to Socha, under claim of title exclusive of any other right? *A.* Yes.

"(2) Did the successors of Hering to and including the defendants enter upon and actually and continuously occupy the premises until the commencement of this action, June 30, 1897, under claim of title exclusive of any other right? *A.* Yes.

"(3) If you answer the first and second questions 'Yes,' then answer: Were the said persons in the actual continued occupation of said premises under claim of title exclusive of any other right for a period of twenty years or more preceding the commencement of this action, June 30, 1897? *A.* Yes.

"(4) Did Michael Gruenewald occupy a portion of the premises under claim of title and exclusive of any other right during any of the time within twenty years before the commencement of this action, June 30, 1897? *A.* No.

"(5) If you answer question 3 'Yes,' then answer: Were said premises during the whole of said period of twenty years protected by a substantial inclosure? *A.* Yes.

"(6) If you answer question 3 'Yes,' then answer: Were said premises used by the several occupants during all of said time as an owner would ordinarily use the same? *A.* Yes.

"(7) Did William Thun abandon all claim that he had upon said premises before Hering entered into the possession thereof? *A.* Yes."

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Judgment was entered for defendants on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Theodore Kronshage, Jr., John H. Paul,* and *J. W. McMillan,* and oral argument by *Mr. Kronshage.*

For the respondents there was a brief by *Fiebing & Killilea, Henry J. Killilea,* and *Moritz Wittig,* attorneys, and *Moritz Wittig* and *Henry J. Killilea,* of counsel, and oral argument by *Mr. Wittig.*

The following opinion was filed February 3, 1914:

KERWIN, J. The chain of title through which the plaintiff claims has been considered by this court in former cases. *Ill. S. Co. v. Konkel,* 146 Wis. 556, 131 N. W. 842, and other cases in this court. The plaintiff made proof of paper title and rested. The defendants claimed by adverse possession under claim of title exclusive of any other right for a period of more than twenty years before the commencement of this action.

The findings of the jury established title in defendants, and the question here is whether such findings are supported by the evidence. There is evidence that one Thun held possession under lease from the owner of the record title before Hering and wife took possession, and it is contended by counsel for appellant that the presumption is that the Herings held by assignment from Thun. There would be great force in this contention if there was nothing in the case tending to rebut such presumption. The defendants, for the purpose of rebutting this presumption, offered evidence tending to show that before the Herings took possession Thun abandoned the premises, and that the Herings immediately took and held possession in hostility to the owner.

It is strenuously urged, however, by counsel for appellant that the evidence shows that possession was given by Thun, a lessee of appellant's predecessor in title, to the Herings and Gruenewalds, therefore the law presumes an assignment of

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the leasehold from the fact of entry and occupation on the part of the Herings and Gruenewalds, and that such presumption is conclusive upon the defendants for the reason that the record contains no evidence tending to rebut it. But there is evidence that Hering claimed the property as his own during the time he lived upon it; that he inclosed the premises with a fence and made some improvements thereon, and sold the property, or some of it, to his successor in possession. Moreover, there is evidence to support the finding of the jury that Thun abandoned all claim to the property before Hering entered into possession. In regard to this question the court charged the jury: "To abandon the land the owner must leave it over to the next comer, whoever he may be, without any intention to return or repossess or reclaim it for himself in any event and regardless and indifferent to what may become of it in the future." In answer to a question as to why Thun left the witness said: "He borrowed some money from Mr. Hering and he also had debts in different stores, and that is why he ran away." In answer to another question as to how Thun left the witness answered: "He left all in a sudden and he left lots of debts, did not pay his debts, and disappeared." There is also evidence that Thun left the city and never came back; that he left the state. In answer to a question as to how the house was bought from Thun, Mrs. Hering testified: "We loaned him $200 and he left and we took the house for the $200." One Sharping also testified that Thun sold the barn on the premises to one Grattschalk and moved away. There is other evidence corroborating the testimony referred to as to the abandonment of the premises. There is no evidence in the record that the Herings had any knowledge of the tenancy of Thun, or that Thun assigned his lease to the Herings or Gruenewalds.

While the evidence tending to establish abandonment is not strong, we are inclined to think that it is sufficient to support the verdict. The contention of appellant that there was no abandonment is based upon the theory that the Herings en-

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tered as assignees of Thun, therefore held under the true owner and became tenants of such owner. But since the Herings had no knowledge of the tenancy of Thun it is difficult to see how they could be made tenants by mere presumption. Upon the established facts in the case the presumption, so far as any exists, would seem to be that the Herings held adversely. They and their successors in occupancy, including the defendants, occupied the premises for more than twenty years continuously before the commencement of the action. Such occupancy raises a presumption of adverse possession. Secs. 4207, 4210, Stats. *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *Pitman v. Hill,* 117 Wis. 318, 94 N. W. 40; *Wollman v. Ruehle,* 104 Wis. 603, 80 N. W. 919; *Ill. S. Co. v. Paczocha,* 139 Wis. 23, 119 N. W. 550; *Ill. S. Co. v. Budzisz,* 139 Wis. 281, 119 N. W. 935, 121 N. W. 362; *Ovig v. Morrison,* 142 Wis. 243, 125 N. W. 449. The foregoing cases in this court show clearly that upon the evidence and findings of the jury the premises were occupied by the Herings and their successors adversely.

But it is contended by counsel for appellant that the evidence does not show entry and occupancy by the Herings prior to June 30, 1877, that is, twenty years before the commencement of this action. Counsel discuss the evidence at length and urge that the evidence of defendants' witnesses is so vague and uncertain as to whether or not the Herings occupied the premises in dispute prior to June 30, 1877, that it should not have been submitted to the jury. Counsel for defendants also discuss the evidence and quote a large part of it on this point in their brief.

We have carefully examined the evidence and are satisfied that the finding of the jury on the question is supported by the evidence. It would serve no useful purpose to review it or quote from it in this opinion.

It is further urged by counsel for appellant that the court erred in submitting the fourth question of the special verdict

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to the jury and in charging the jury on that question. The fourth question involves the occupancy by the Gruenewalds. Counsel claims that there is no evidence from which it can be inferred that there was any privity between Gruenewald and Hering or any of the latter's successors, hence the fourth question should not have been submitted to the jury. An examination of the charge upon this question satisfies us that there is no prejudicial error in it, if there was sufficient evidence to warrant the court in submitting the question to the jury. We are inclined to think that the evidence is sufficient to support the answer of the jury to the fourth question either on the ground that the shanty or barn in which the Gruenewalds lived was not on the premises in question, or that the Gruenewalds were occupying by permission of the Herings and not adversely to them. There is evidence to the effect that the barn or shanty where the Gruenewalds lived was fifty feet distant from the Herings' house; that the Gruenewalds made no claim to the premises occupied by them; that they moved away before the Herings did. Mrs. Gruenewald testified that she never heard her husband say anything about claiming anything, that he never said he claimed land or house or anything else. Michael Gruenewald testified that he did nothing with the shanty, only let it stand and went about his business; that Hering took it and sold it. "He sold his house and mine." There is other evidence in the record tending to show that Gruenewald was not holding adversely but by permission from Hering.

Counsel for appellant further claim error in refusal to admit in evidence church records relative to the birth and baptism of the children of Michael Gruenewald. The court held the records admissible for the purpose of showing the date of baptism and of the fact that Mrs. Hering and Mrs. Schoenemann were witnesses who stood up for the infant child, who was baptized at that date, but held that the records were not evidence of the date of the birth. Whether there

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was any error in the ruling in this regard we shall not consider because we are satisfied that even if the ruling was erroneous it was not prejudicial to the appellant.

We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on May 1, 1914.

HATHAWAY, Appellant, vs. ARNOLD, imp., Respondent.

February 3—May 1, 1914.

Fraud: Conveyances of land: Bona fide *purchaser: Husband and wife: Principal and agent: Imputed knowledge: Evidence: Relevancy and materiality: Forgery: Pleading: Amendment: Reopening case: Notice of* lis pendens.

1. Exclusion of preliminary questions intended to lead up to proof that a deed to one of the defendants was forged was not error where the purpose of such questions was not indicated and no issue of forgery was raised by the pleadings.
2. The denial of a motion, made during the trial, to amend the complaint so as to allege forgery of a deed to one of the defendants, was not an abuse of discretion, where the statements of fact in the supporting affidavit, if taken as true, had little tendency to prove the commission of a forgery, and a statement therein that the plaintiff expected to prove that one of the signers did not acknowledge the deed was not corroborated by affidavit of such signer, although he was plaintiff's principal witness on the trial and admittedly hostile to the defendants.
3. A motion to reopen the case, long after the parties had submitted their proofs, to enable plaintiff to offer newly discovered evidence upon the question whether one of the defendants was a *bona fide* purchaser of the land in question, is *held* to have been properly denied upon the showing made.
4. A transaction by which a married woman acquires title, ostensibly in the character of a *bona fide* purchaser, to land which her husband had previously secured from another by fraud, is naturally and properly viewed with suspicion by the courts.
5. But in this case, it appearing that the wife had a separate estate, and nearly all the direct evidence tending to show that she

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paid full value for the land to a corporation in which the title had been vested, and that she had no knowledge of the fraud, it is *held* that a finding of the trial court to the effect that she was a *bona fide* purchaser should not be set aside unless knowledge of the fraud was chargeable to her as a matter of law.

6. The trial court having in substance found upon sufficient evidence that the husband did not act as his wife's agent in the transaction in question, there is no conclusive presumption that she had knowledge of his fraudulent acts affecting such transaction.

7. Where the information which an agent has of previous transactions and his relation thereto are of such a character that he would not disclose to his principal a fraud which had been perpetrated by him therein, notice of such fraud is not imputable to the principal as a matter of law.

8. The question being whether a defendant was a *bona fide* purchaser of certain land conveyed to her before the action was commenced, evidence of the filing of notice of *lis pendens* before her conveyance was recorded was immaterial.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This action was brought by the plaintiff to recover five lots or the value thereof from the defendants, on the ground that the defendants had defrauded plaintiff out of such lots. The court in substance found that the E. A. Arnold Land Company, a corporation, acted as the agent of the plaintiff in purchasing all of the lots owned by the Roosevelt Estate in the city of Superior; that such purchase was made for the sum of $8,000 and the purchase price was paid by the plaintiff to its agent; that the agent represented that the number of lots owned by said estate was sixty-nine, whereas in fact it owned seventy-four lots, and that number of lots was purchased with the money furnished by the plaintiff; that for the purpose of cheating and defrauding the plaintiff, the Arnold Land Company caused sixty-nine of said lots to be conveyed by the Roosevelt Estate to the plaintiff and the remaining five lots to be conveyed to the Roosevelt Terrace Company, a corporation which was practically owned and controlled by E. A. Arnold,

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who was also a half owner of the stock in the E. A. Arnold Land Company and who negotiated the purchase of the lots from the Roosevelt Estate, acting as the agent of the corporation; that the five lots out of which the plaintiff had been defrauded were of the value of $3,250.

These lots were conveyed to the Roosevelt Terrace Company about the month of June, 1907, and were conveyed by the Roosevelt Terrace Company to *Mabel A. Arnold,* the wife of E. A. Arnold, on or about February 1, 1908, and the deed was recorded on March 17, 1908. This action was commenced on March 14, 1908, against the two defendant corporations, and after the recording of the deed to *Mabel A. Arnold* she was also made a party.

The principal controversy in the case arises from the seventeenth finding of fact, which is as follows:

"That on and prior to February 1, 1908, the defendant *Mabel A. Arnold,* who was then the wife of E. A. Arnold, had a separate estate amounting to several thousand dollars; that she was the owner of three pieces of land, 160 acres in section 8, 80 acres in section 11, and 106 acres in section 12, in Douglas county, and had during the months of November and December, 1907, loaned money to the Roosevelt Terrace Company in the sum of $802; that on or about February 1, 1908, negotiations were had between the defendant *Mabel A. Arnold* and A. S. Andrews, who was then the president of the Roosevelt Terrace Company, in which negotiations E. A. Arnold participated, wherein and whereby the said *Mabel A. Arnold* purchased of the Roosevelt Terrace Company the five lots in question, giving in exchange therefor the three pieces of land above described, conveying the same to the Roosevelt Terrace Company, and also applying the $802 loaned to the company as above stated, and receipting to the company for the payment of such loan, and received from the Roosevelt Terrace Company a warranty deed for the five lots in question, which was delivered to her on or about February 3, 1908, and recorded in the office of register of deeds of Douglas county on March 17, 1908. That at the time of making said negotiations and the purchase of said lots and conveyance of the same and payment therefor as above stated the defend-

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ant *Mabel A. Arnold* had no knowledge or information of the transaction between E. A. Arnold Land Company and the plaintiff and was a *bona fide* purchaser of the lots in question, having purchased and paid for the same without any knowledge or information that the title of the Roosevelt Terrace Company was not good."

As conclusions of law the court found that *Mrs. Arnold* was a *bona fide* purchaser of the lots in controversy and that she was entitled to the same and to recover costs against the plaintiff. The court further found that the plaintiff was entitled to judgment against the Arnold Land Company and the Roosevelt Terrace Company for the value of the five lots in question, which was found to be $3,250 with interest, and for costs and disbursements of suit. The plaintiff appeals from that portion of the judgment which was entered in favor of *Mabel A. Arnold.*

For the appellant there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *George B. Hudnall.*

For the respondent, *Mabel A. Arnold,* there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

The following opinion was filed February 24, 1914:

Barnes, J. The plaintiff assigns the following errors upon which he relies to reverse the judgment: (1) The court erred in excluding evidence offered to show that the deed from the Roosevelt Terrace Company to *Mabel A. Arnold* was forged and void. (2) The court erred in denying the motion of the plaintiff to amend the complaint upon the trial so as to allege that said deed was forged and void. (3) The court erred in denying the motion of the plaintiff, made after the testimony had been taken and before the findings of fact and conclusions of law had been filed, to be permitted to procure testimony as to the domestic relations existing between *Mabel A. Arnold* and her husband at the time an alleged settlement was made between them on July 6, 1906. (4) The court erred in making the seventeenth finding of fact and

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in making the conclusions of law based thereon. (5) The court erred in denying the motion of the plaintiff after judgment to be permitted to offer in evidence the notice of *lis pendens* which was filed after the action was begun. Some other errors are assigned, but the foregoing raise all of the questions that are argued in the briefs or that were argued at the bar.

1. The first error assigned is not well taken. Three questions were asked which it is claimed would tend to show that the deed under which *Mabel A. Arnold* claimed was forged, if the court had permitted them to be answered. The court did allow one of them to be answered, and the other two were merely preliminary and did not indicate that plaintiff was attempting to prove forgery. Besides, no such issue was raised by the pleadings.

2. The plaintiff during the trial moved to amend the complaint by alleging that the deed to *Mrs. Arnold* was a forgery. This motion was based on an affidavit made by the plaintiff. The material statements contained in the affidavit were that E. A. Arnold had chemicals in his office which would remove ink stains and that he was an expert in their use; that by the use of such chemicals the descriptions inserted in the deed which was acknowledged might have been erased and others substituted, and that plaintiff verily believed this had been done; that Charles Highfield, one of the witnesses to the deed, would testify that when he signed the deed as a witness it had not been signed by the president and secretary of the corporation, and that he signed without knowing what the deed contained; that Arnold had stated to C. A. Russell that plaintiff would have "a h—l of a time getting those lots back," as he had deeded three of them to his wife and two to his little girl, and that the plaintiff expected to prove that the deed offered in evidence was not acknowledged by C. A. Russell. The affidavit further showed that defendants refused to produce the deed and relied on the record of the same.

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The evidence at the time the motion was made was to the effect that the deed was lost.

The court denied the application on the merits, evidently believing that it would not be in furtherance of justice to grant it.

We do not think the court abused the discretion vested in it by sec. 2830, Stats. If all of the statements of fact contained in the affidavit were taken to be true they would not have much tendency to prove the commission of a forgery. It is true the plaintiff states that he believes a forgery was committed, but this is only his conclusion drawn from the facts which he states in his affidavit. It is likewise true that plaintiff stated he expected to prove that Russell did not acknowledge the deed, the record of which was offered in evidence. No affidavit to this effect was made by Russell, although he was plaintiff's principal witness on the trial and admittedly hostile to the defendants. It is pretty evident that if plaintiff could produce any evidence tending to show forgery, he expected to get it from Russell. Russell was equally interested with E. A. Arnold in the E. A. Arnold Land Company, and participated with Arnold in the fraud which had been practiced on the plaintiff, and apparently shared in the profits of the transaction. Russell had been examined and cross-examined at great length before the motion to amend was made, and the court might well have reached the conclusion that he was not a witness whose testimony was entitled to credence.

3. Long after the parties had submitted their proofs, the plaintiff sought to have the case reopened for the purpose of taking certain testimony. The Arnolds claimed that they had a settlement July 6, 1906, by which certain real property was to be conveyed to *Mrs. Arnold* on account of moneys furnished from her separate estate to her husband for investment. These lands were part of the consideration which she claimed to have paid the Roosevelt Terrace Company for the

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lots conveyed to her by that company. The proof which plaintiff proposed to offer was to the effect that when the settlement of 1906 was made the parties were contemplating divorce proceedings and were agreeing upon a division of property preparatory to the commencement of the divorce case. We think it is quite clear that on the showing made the motion was properly denied.

4. The principal contention arises over the seventeenth finding of fact. The appellant insists that the court was wrong in holding that *Mrs. Arnold* was a *bona fide* purchaser without notice, and that in any event E. A. Arnold acted as the agent of his wife in the transaction and that his knowledge was imputable to her as a matter of law.

A transaction by which a husband fraudulently secures the title to the property of another, and then so manipulates it as to get the title transferred to his wife, and at the same time makes her a good-faith purchaser so that the property is lost to its true owner, is naturally and properly viewed with suspicion by the courts. The transaction here involved has many earmarks that tend to show that it was crooked. There was some direct evidence which indicated that *Mrs. Arnold* had knowledge of the fraud that had been perpetrated. Legitimate inferences to the same effect might have been drawn from other testimony. We would have been better satisfied had the trial court held that the evidence failed to establish the *bona fides* of the transaction by clear and satisfactory evidence as the law requires. *Horton v. Dewey,* 53 Wis. 410, 10 N. W. 599; *Fisher v. Shelver,* 53 Wis. 498, 10 N. W. 681; *Le Saulnier v. Krueger,* 85 Wis. 214, 54 N. W. 774; *Martin v. Remington,* 100 Wis. 540, 545, 76 N. W. 614; *Disch v. Timm,* 101 Wis. 179, 192, 77 N. W. 196. There is nothing, however, to show that the court did not have the correct rule of law in mind when deciding the case. All of the direct evidence except that given by Russell tended to show that *Mrs. Arnold* had no knowledge of the fraud and that she had property acquired from her separate estate at the

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time she received a conveyance of the lots and that she paid full value for them by conveying property which she owned to the Roosevelt Terrace Company and by canceling a debt of $802 which that company owed her. It may well be that the court disbelieved Russell's testimony, for reasons before stated as well as for other more cogent reasons. The court was evidently impressed with the sincerity and candor of *Mrs. Arnold* and must have been clearly satisfied that, notwithstanding the suspicious circumstances alluded to, she was in reality a good-faith purchaser. Probably no great amount of credence was given to either Arnold or Russell. While we are doubtful about justice having been done, we are not at all certain that a reversal might not work injustice, and we conclude that the finding should not be set aside unless knowledge of the fraud was chargeable to *Mrs. Arnold* as a matter of law.

Appellant concedes that the evidence showed that *Mrs. Arnold* had a separate estate. She testified that she had her earnings and the profits derived from them invested in real estate; that she always relied upon her husband in all her real-estate matters; that substantially all of her money had been so invested by him; that she never purchased anything without Arnold having something to do with it; that he bought tax certificates for her and acted on his own judgment as to what to buy, and that he bought lands with her money and that she did not know whether he took the title in her name or not. If the alleged settlement made between Arnold and his wife in 1906, and the deed made conveying the lots in controversy, be left out of consideration, the proof shows that Arnold had a free hand in investing his wife's money and that she did not have any accurate knowledge of what was bought with it or who held the title to it. In one portion of her testimony *Mrs. Arnold* testified that the deal for the lots in question was made entirely through Mr. Arnold. At another time she said she should judge it was, that he was to look after the details for her, to close up the transaction.

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Her narrative of how she came to acquire the lots was that she owned 406 acres of land in Douglas county which her husband wanted her to convey to the Roosevelt Terrace Company, and that she refused to do so unless she was paid what they were worth; that her husband desired her to take the note of the company for the purchase price and that she refused; that she knew the Terrace Company owned or claimed to own the lots in question, as they were next to the house in which she lived and which she owned; that she offered to trade the lands for the lots and also to cancel an indebtedness from the Terrace Company to her as an additional consideration; that she talked the matter over with her husband, who was president of the corporation, and with Dr. Andrews, who was secretary thereof, and that they finally agreed to a trade, she representing herself in the transaction and they representing the corporation in which they owned or controlled practically all of the stock.

The appellant's proposition on this branch of the case is that Arnold acted as the agent of his wife in the purchase of the lots in controversy; that he having committed the fraud by which his corporation acquired them he knew all about it, and that there is a conclusive presumption that *Mrs. Arnold* had actual or constructive knowledge of the acts of her agent, under such decisions as *Andrews v. Robertson,* 111 Wis. 334, 87 N. W. 190; *Brothers v. Bank of Kaukauna,* 84 Wis. 381, 54 N. W. 786; *Wolf Co. v. Kutch,* 147 Wis. 209, 215, 132 N. W. 981; and *Pluto P. Co. v. Cuba City State Bank,* 153 Wis. 324, 331, 141 N. W. 220.

The contention cannot be upheld for two reasons. In the first place the evidence justified the court in finding that Arnold did not act as his wife's agent in the sale of the lots to her, and it has in substance so found.

In the next place, the information which the agent had in this case was of such a character and his relation to the previous transaction was of such a nature that he would not disclose the fraud that had been perpetrated. On such a state

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of facts there is no conclusive presumption of notice to the principal. *Cole v. Getzinger,* 96 Wis. 559, 576, 71 N. W. 75; *Melms v. Pabst B. Co.* 93 Wis. 153, 169, 66 N. W. 518; *Allen v. South Boston R. Co.* 150 Mass. 200, 22 N. E. 917.

We have not overlooked an item of evidence to the effect that about November 1, 1907, *Mrs. Arnold* requested her husband to secure one of the lots in question for her which was adjacent to her homestead. This request was made about four months after the Roosevelt Terrace Company had fraudulently acquired the property, and it does not appear that Arnold paid any attention to the request or that it figured in the transaction of February 1, 1908, when the five lots were conveyed to *Mrs. Arnold.* Had it been otherwise, under the rule in *Cole v. Getzinger,* the agent's knowledge would not be imputable to the principal as a matter of law.

5. We do not see how the introduction in evidence of the notice of *lis pendens* could have affected the plaintiff's rights or changed the result of the suit in any way. The property had been conveyed to *Mrs. Arnold* before the action was commenced and plaintiff acquired no right in the lots after the deed was given and before it was recorded which he did not possess before.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

A motion for a rehearing was denied, with $25 costs, on May 1, 1914.

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DEROUSO, Appellant, vs. INTERNATIONAL HARVESTER COMPANY OF AMERICA, Respondent.

February 4—May 1, 1914.

Corn shredders: Safety devices: Removal by owner: Liability of seller: Proximate cause of injury.

1. Under sec. 1636—131, Stats. 1911, the seller of a corn shredder is required to provide it with safety or automatic feeding devices, not only in front of the snapping rollers, but also in front of the husking rollers, so that the material, once fed into the machine, will be automatically carried along and taken care of, unassisted by the operator of the machine.
2. Said sec. 1636—131 makes it the absolute duty of the seller to *equip* the machine with the specified safety devices, and of the owner or operator to *maintain* them; and such devices must be reasonably adequate and efficient to perform the functions required of them.
3. The duty to maintain being as absolute as the duty to equip, the owner or operator cannot detach the safety devices and, under a claim that they were useless, render the seller liable for an injury thereafter resulting.
4. In an action against the seller of a corn shredder for an injury to an employee of the purchaser, whose hand was drawn between the husking rollers when he attempted to dislodge ears of corn and refuse which had become clogged in the automatic feed to such rollers, it appearing that an automatic agitator, which was intended to stir up the material and align the ears as they dropped from the snapping rollers down upon said automatic feed, had become broken and had been removed by the purchaser, a verdict for the defendant was properly directed, even though it was claimed that such agitator was useless and even though its insufficiency be conceded, since, not being in use, its insufficiency cannot be said to have been the proximate cause of the injury.

APPEAL from a judgment of the circuit court for Barron county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action for personal injury. On November 3, 1911, the plaintiff, while in the employ of one Secor assisting in shredding corn, received an injury to his hand on the husking roll-

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ers of a steam corn shredder which Secor had purchased from defendant. This action is brought under the provisions of sec. 1636—131, Stats. 1911, which provides:

"Any person, firm, or corporation who shall sell, offer or expose for sale, or use any machine to be operated by steam, or other power, for the purpose of husking or shredding corn or corn stalks shall provide such machine with safety or automatic feeding devices for the protection from accident by the snapping rollers, husking rollers, and shredding knives of any person using or operating such machine in the discharge of their duty, and such machine shall be so guarded that the person feeding said machine shall be compelled to stand at a safe distance from the snapping rollers; and any person, firm, or corporation operating such machine shall maintain thereon such safety or automatic feeding devices. The duty to equip such machine with safety or automatic feeding devices, as well as the duty to maintain the same, shall be absolute; and the exercise of ordinary care on the part of such person, firm, or corporation operating such machine shall not be deemed a compliance with such duty; and in case any person in the employ of such person, firm, or corporation operating such machine continues in such employment when such device has not been installed and maintained, as above provided, such employee shall not be deemed guilty of a want of ordinary care, on account of so continuing in such employment."

It appears that when the machine was sold it was equipped with an automatic agitator whose function it was to stir up, agitate, and align the ears of corn as they dropped from the snapping rollers down upon the automatic feed carrying them to the husking rollers. This agitator had been broken previous to plaintiff's injury and was entirely removed from the machine. While the shredder was being operated, ears of corn and refuse became clogged in the feed to the husking rollers. In order to dislodge the clogged material plaintiff took a stick between two and one-half to three feet in length and poked in among the material. In doing so, at the second stroke, his coat sleeve near the end caught on the husking

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rollers and his hand was drawn in and injured. Plaintiff's evidence was to the effect that the corn shredder clogged equally badly when the agitator which was removed was in place and in good working condition. The court and jury viewed the corn shredder. Defendant introduced no evidence. A motion for a directed verdict in favor of defendant was granted, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *W. H. Frawley & T. F. Frawley,* and oral argument by *T. F. Frawley.*

For the respondent there was a brief by *Clarence C. Coe* and *David A. Orebaugh,* attorneys, and *Edgar A. Bancroft,* of counsel, and oral argument by *Mr. Orebaugh.*

The following opinion was filed February 24, 1914:

VINJE, J. The trial court directed a verdict for the defendant on the ground that, since it was admitted that the shredder was equipped with a safety feeding table or device in front of the snapping rollers which complied with the statutory requirements relative thereto, no liability could attach to defendant on account of any failure to equip the machine with safety feeding devices in front of the husking rollers. In this it erred. The statute makes it as much the duty of the seller to provide a corn shredder with automatic feeding devices in front of the husking rollers as in front of the snapping rollers. Such devices are of course of an entirely different nature. Popularly speaking, the machine is fed only in front of the snapping rollers. All material enters there. But it must pass through the machine, and in order to do so it must be automatically carried along—the ears of corn to the husking rollers and the stalks to the shredding knives. Such carrying along or feeding to the husking rollers and shredding knives is by the statute required to be self-acting or automatic, unassisted by the operators of the machine, because of the danger to life and limb in hand-feeding

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or in assisting therein. The feeding table in front of the snapping rollers is required to be long enough so that the feeder shall be made to stand at a safe distance from them. Obviously no such feeding arrangement for the shredding knives or husking rollers was contemplated by the statutory requirements. But it was contemplated that the material, once being properly fed into the machine, should automatically be taken care of, and that the machine should automatically perform the other operations necessary to properly do the work it was designed to do.

The evidence shows that the machine in question was so constructed that it automatically carried the stalks into the shredding knives after leaving the snapping rollers. It was also provided with an agitator in front of the husking rollers whose function it was to stir up the material dropping down from the snapping rollers and especially to align the ears of corn. This agitator was operated by being fastened to a revolving shaft so bent at the point of attachment as to act as an eccentric. Some time before the injury occurred this shaft broke and it was taken out of the machine and the agitator became wholly useless.

The statute imposes two entirely separate and distinct duties. First, it requires the seller to *equip* the machine with the specified safety devices, and second, it requires the owner or operator of the machine to *maintain* such safety devices. Both duties are made absolute. A showing of the exercise of ordinary care in either of such respects is not enough. In the present case the owner or operator of the machine, Mr. Secor, failed to maintain the agitator with which the machine was equipped when sold. Under such circumstances, can the seller be held liable on the ground that he failed to equip it with the required safety devices? It seems to us not. That the statutory safety devices shall be reasonably adequate and efficient to perform the functions required of them seems clear, and it may be conceded, for the purposes of this case at least,

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that if when properly maintained they fail to reasonably perform their purpose and injury results therefrom without fault of the injured person, the seller would be liable in damages. But since the duty to maintain is as absolute as the duty to equip, the owner or operator cannot detach the safety appliances and render the seller liable by the claim that they were useless. The statute neither contemplates nor admits of such conduct on the part of the operator. This is made clear by the amendment to sec. 1636—131*m*, Stats. 1913, contained in sec. 47, ch. 773, Laws of 1913, specifically prohibiting the use of such a machine with the safety devices or guards detached. It is true this amendment was made since the injury in question occurred, but it only gave express utterance to what was already implied by the statute.

Had the agitator been maintained as the statute required, no one could say that this injury would have occurred. Hence the jury could not find, under the facts in this case, that the insufficiency of the agitator was the proximate cause of plaintiff's injury. It was not taken out because it was useless, but because it was broken, though that fact is perhaps of little significance in view of the absolute statutory duty to maintain it as equipped. The ground of nonliability of the defendant is that, conceding the insufficiency of the agitator, it cannot be said that such insufficiency was the proximate cause of the injury to plaintiff. It was not operating as a cause at all at the time the injury occurred. What would have happened had it been in operation it is useless to speculate upon, for we have not such a case before us.

In view of the specific and absolute statutory duty to maintain safety devices and guards upon such machines no one should, in the absence of such maintenance, be permitted to claim that they were useless and thus place liability upon the seller. The adequacy of an appliance not used when an injury occurs should not be made an issue, because, as before stated, no matter how determined, it cannot be proximately

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connected with the injury. For these reasons the court properly directed a verdict for defendant.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on May 1, 1914.

BRENNAN, Appellant, vs. HEALY, Respondent.

February 4—May 1, 1914.

Attorney and client: Contracts, express and implied: Trial: Submission of case to jury: Instructions: Harmless errors.

1. In an action for the value of services rendered, it is *held* that under the evidence the trial court properly charged the jury and submitted the case upon the theory that plaintiff claimed under an express contract of employment as well as upon the theory that an implied contract was claimed; and that the frequent use of the terms "contract of service" and "employment" in the charge was not misleading.
2. Except as to certain special issues, such as fraud and the like, the jury in a civil action are required to be convinced or satisfied of a fact by the preponderance of the evidence only, and it is error to charge them that the evidence must be "clear and convincing."
3. Such error will not be regarded as prejudicial, however, where the trial was fairly conducted and the charge as a whole was favorable to the party complaining, and where the evidence in his favor upon the issue in question was very slight or practically negligible, so that there would be little probability of a different result upon another trial.
4. Where, at the close of the charge to the jury, defendant's counsel, seeking to eliminate possible error from the record, called attention to a supposed inaccuracy in the charge in a statement of plaintiff's claims, and the same was immediately corrected, and plaintiff's counsel suggested no other inaccuracy, the error, if any, was cured.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action to recover the reasonable value of services alleged

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to have been rendered by the plaintiff for and at the request of the defendant, which services were alleged to consist of legal work and advice and expert advice with reference to the exploring and leasing of iron mining lands on the Cuyuna ranges in Minnesota. There was some dispute on the trial as to the actual facts and very serious dispute as to the inferences of fact to be drawn therefrom. The plaintiff was and is an attorney at law in active practice at Superior, and was shown to have had much experience in mining business and litigation, in negotiating options on mining lands, drawing mining leases and options, and was also shown to have studied the iron formations in the Superior district and on the range in question.

In February, 1908, and prior thereto, one Thomas Keating owned three forty-acre tracts of land on the range in question, and the defendant owned one forty immediately north thereof. In February, 1908, Gaylord & Guith, drilling contractors, having discovered iron ore upon certain lands east of the lands of Keating and *Healy,* came to Keating and *Healy* for the purpose of making arrangements if possible to drill for iron ore on their lands, in consideration of an interest therein. They came to the plaintiff's office with Keating, February 29, 1908, and a contract was then entered into between them and Keating, whereby they were to make drillings on his land in consideration of a conveyance of a one-fourth interest therein. This contract was drawn by the plaintiff, as attorney for Keating, and its terms were substantially influenced by plaintiff's advice to Keating. Drilling commenced on Keating's land immediately and iron ore was struck about the 17th of March. Keating had instructed plaintiff not to inform *Healy* of the contents of the drilling contract, and when *Healy* met plaintiff on the street a short time after the contract was drawn *Healy* asked plaintiff about the terms of the contract and plaintiff informed him of his instructions, and declined to give him the information. Ac-

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cording to plaintiff's testimony, plaintiff then told defendant that he would advise him with reference to his lands if he would call at his office and he (*Healy*) promised to do so, but this was denied by *Healy*. On the 31st of March defendant entered into a contract with the same drilling firm to drill his land, the terms of which contract followed so closely the terms of the Keating contract that there can be little doubt that the Keating contract was used as its basis. This contract was not, however, drawn by plaintiff, nor did he know of its execution at the time. Drilling proceeded on the lands of both Keating and *Healy* during the summer and fall. Blue prints and monthly reports of the drillings were furnished by the drillers to Keating and samples of the rock. These blue prints, reports, and samples were submitted by Keating to the plaintiff as furnished. After ore had been found on *Healy's* land and after Keating had begun to consider the question of making a contract for the mining of the ore, *Healy* told Keating, in substance, that he could take his (*Healy's*) samples of ore, and that whatever he (Keating) got for his ore he could deal the same way with his (*Healy's*). There is no direct proof of any broader agency than this on the part of Keating. Late in October or early in November, 1908, Keating made an oral arrangement with one Crosby to take mining leases of both his and *Healy's* land at a royalty of twenty-five cents per ton. The plaintiff claims that before this took place he had met *Healy* at his (*Brennan's*) office at Superior by appointment, and that *Healy* had brought him, at his (*Brennan's*) request, a blue print of the drilling on his forty, and that he (*Brennan*) then advised him (*Healy*) not to accept an offer of eighteen and three-fourths cents per ton made by Crosby, and that he promised not to do so. This interview is absolutely denied by *Healy*. On November 11th Keating came to Superior and he and *Healy* arranged to go to Crosby's office at Duluth to close the contracts with Crosby. At Keating's house there was a difference of opinion as to

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whether they should take a lawyer with them to help them in their negotiations with Crosby. Keating and *Healy* did not wish to do so, but Mrs. Keating said, "So long as they were paying *Brennan* they might as well take him." Keating and *Healy* finally agreed and went to *Brennan's* office, and all three went to Crosby's office. *Brennan* assisted actively in the preparation of the necessary leases, deeds, and contracts on that day and the following, and the arrangement with Crosby by both Keating and *Healy* was finally closed.

The charge of the court to the jury is vehemently complained of as a mistake of the real issues, and it seems to become necessary to set it forth in some detail. The charge begins as follows:

"The plaintiff by his complaint in this action claims that during the time from February 29, 1908, to December 1, 1908, he was in the employ of the defendant as an attorney and as an expert in the matter of developing, exploring for iron upon and dealing with reference to forty acres of land on the Cuyuna iron range, in Crow Wing county, Minnesota, described in the complaint; that pursuant to such employment he rendered services to the defendant, and that such services were reasonably worth ten thousand dollars. Plaintiff does not claim that such employment resulted from any conversation or dealing had by him with the defendant personally, but claims that he was employed to render the services sued for by one Thomas Keating, whom he claims acted and was authorized to act in the matter as the agent of the defendant.

"The defendant to rebut the plaintiff's claim denies that Keating was authorized by him to employ plaintiff, denies that plaintiff was employed, denies that plaintiff rendered him any services for which claim is made, and denies that any service rendered for him by plaintiff, if rendered, was of any value.

"You are instructed that as to each claim made by the plaintiff the burden is upon him to satisfy you by a preponderance of the evidence and to a reasonable certainty as to his contention with reference thereto. As to the question whether

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or not Keating was authorized by defendant to employ plaintiff, and as to the nature of the service for which he was authorized to employ him, you are instructed that you may be satisfied that such authority was in fact given by defendant to Keating, either from direct evidence to that effect or from proof of such facts and circumstances that such authority may reasonably be inferred therefrom, and you are instructed that such authority may be inferred from facts and circumstances proven in the case, if such facts and circumstances are of such a nature as to reasonably warrant such inference therefrom.

"You are instructed, also, that as to whether or not a contract of service existed between the plaintiff and defendant, that if you find that Keating was authorized by defendant to employ the plaintiff in his behalf, that then the claim that a contract existed may be established by proof of express employment, or by proof of such facts and circumstances that the existence of a contract of employment may reasonably be inferred therefrom, and that you have a right in considering this question to draw such inference from facts and circumstances proven as their nature reasonably warrants.

"If you find that Keating was authorized by defendant to employ the plaintiff, and that Keating in fact did employ plaintiff on defendant's behalf, you will then consider the question as to whether or not the plaintiff rendered services to the defendant pursuant to such employment, and the kind and amount of such service so rendered, if any."

The court then proceeds to state in substance that a contract may be established by proof of express employment or by proof of such facts and circumstances that the existence of a contract may be reasonably inferred; that if Keating was authorized to employ plaintiff and did in fact employ him, the question whether services were in fact rendered pursuant to the employment and the kind and amount of the services so rendered must be considered; that there were two kinds of services claimed, namely, services as an attorney and legal adviser, and services as an expert in drilling, exploring, developing, and dealing with mining lands; that it was undisputed that plaintiff was in Keating's employ as an attorney,

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but that there was a dispute whether he was in Keating's employ as an expert in matters relating to iron mining lands. The charge then proceeds as follows:

"This contention would be unimportant and wholly immaterial in this case except for the contention on the plaintiff's part that during the time in question he was employed by Keating as defendant's agent to render similar services to the defendant as to the defendant's lands, and that he did in fact render to the defendant services of that nature pursuant to such employment. The situation requires careful consideration on the part of the jury of the evidence bearing upon the question as to whether the minds of Keating and the plaintiff met on the matter of plaintiff being employed by Keating to render service for defendant. You are instructed that in order for you to find that plaintiff was so employed, you must find from the evidence, and by a preponderance of the evidence, that the minds of Keating as agent of defendant, if he was his agent, and plaintiff met upon that proposition, and in view of the fact that the plaintiff was serving Keating personally as his attorney, the evidence, in order to justify a finding that plaintiff was employed to render service in the capacity of an expert in mining matters, should be clear and convincing; this in view of the fact that it is a matter of common knowledge that business men who employ lawyers frequently discuss business matters with such lawyers, and that such discussion is customarily not made the subject of a charge by the lawyer separate from his charge for legal services, so that to justify you in finding that the minds of the parties to this action met upon a contract for services by which plaintiff was to receive compensation for services as an expert in mining matters, over and above his charge for services as a lawyer, the evidence upon that point should be clear and convincing.

"You are further instructed that if you find from the evidence that Thomas Keating was the agent of the defendant in relation to the handling, exploring, developing, and leasing of the *Healy* property, Keating's authority included whatever was necessary to effect the main purpose of the agency, including the employment of a subagent, and the defendant is bound by such employment even though not expressly authorized by him.

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"The court further instructs you that no express employment is necessary to charge defendant with liability to the plaintiff for services, which you find were performed by plaintiff for defendant in respect to the property in question, but that an agreement in fact creating such obligation may be implied or presumed from the acts and conducts of the parties; and further, that if you find that plaintiff did in fact perform services for defendant with his knowledge, defendant is liable to plaintiff for the same, unless you further find that such services were intended by the plaintiff to be gratuitous, or that they were performed under such circumstances that the defendant was warranted in believing and did believe that they were intended to be gratuitous."

. . . . . .

"If the jury finds from the evidence that the plaintiff is entitled to recover from the defendant, then you are instructed that he is entitled to recover the reasonable value of his services, and in estimating said value you have the right to allow him for all services performed, whether it consisted of both legal services and information, business and expert advice with respect to the handling of the defendant's mineral lands and ore, and the exploring, developing, and leasing of the same, or of only one kind of services, according to what you shall find in that regard.

"You are further instructed that in estimating the reasonable value of plaintiff's services which you find he performed for defendant, you should take into consideration the value of the *Healy* property and the financial benefits, if any, reasonably to have been anticipated by the parties at the time the services were rendered as resulting to the defendant from such services.

"You are further instructed that if plaintiff performed services at the request, express or implied, of Thomas Keating, and a part of such services were in fact performed for the defendant, with his knowledge, defendant is liable to plaintiff for the reasonable value of that portion of such services which were so performed for him and of which he received the benefit.

"You are further instructed that if, as the agent of the defendant, Thomas Keating employed plaintiff to perform services which were beneficial to defendant in respect to the property in question, the defendant is liable to the plaintiff

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for the reasonable value of such services, whether or not Keating informed plaintiff that the services were in whole or in part for the benefit of defendant."

The jury having returned a general verdict for the defendant, the plaintiff appeals from judgment thereon.

For the appellant there was a brief by *John Brennan, in pro. per.,* and *L. K. Luse,* of counsel, and oral argument by *Mr. Brennan.*

W. P. Crawford, for the respondent.

The following opinion was filed February 24, 1914:

WINSLOW, C. J. A number of exceptions to rulings upon evidence are raised and argued in appellant's brief. It must be sufficient to say with regard to these alleged errors that we have examined them and do not consider them of sufficient importance to justify their treatment in detail. If there was error in any of them, it seems quite certain that it was nonprejudicial. The real contention on the merits of the case is that the charge was misleading in that it gave the jury the impression that plaintiff claimed there was an express contract of employment and that it was necessary in order to justify a recovery that an express contract be proven; whereas as matter of fact the plaintiff only sought to recover on the ground that he had rendered valuable services to the defendant which were accepted by him, and for which the law will imply a promise to pay their reasonable value.

We do not regard this contention as sound. The plaintiff in fact made both claims. His complaint charged services of the reasonable value of $10,000 performed for the defendant "at his special instance and request." Under this complaint there could doubtless be a recovery upon either theory. An express request by the defendant or his duly authorized agent might be proven, or the rendition of the services with the knowledge of the defendant and their acceptance by him, thus raising the implied promise, might also be proven. As mat-

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ter of fact it is apparent that the plaintiff attempted to prove both and relied upon both. Very early in the case, while the plaintiff was on the stand as a witness, the question was asked whether advice given to Mr. Keating as to the value of ore on his forty would be advantageous to the owner of the *Healy* forty. Objection was made to this question, and the court asked what the theory of the evidence was, to which plaintiff's counsel replied, "Mr. Keating was the agent of *Mr. Healy.*" The court then said, "You haven't shown that;" whereupon plaintiff was withdrawn from the stand and a part of the deposition of the defendant, taken before trial under sec. 4096, Stats., was offered by plaintiff tending to show that *Healy* had given Keating authority to take samples from the drillings on his (*Healy's*) land and to make a deal with some person for the mining of the ore, and that he knew that *Brennan* was acting for Keating. After this testimony was received the plaintiff was recalled to the stand and asked to state "whether or not you rendered or performed any services at the request of *Mr. Healy* in regard to the ore, exploring, developing, and leasing of it on his forty acres (describing it), between February 1st and December 1, 1908." Objection being made to this question, a colloquy took place between court and counsel, and the court stated that he supposed there should be some proof of the fact that a contract relation existed as a basis for the testimony, and plaintiff's counsel replied "express or implied contract certainly." The court then said: "Your question . . . calls for a conclusion of the witness as to whether or not there was a request; probably the nature of the request should be made to appear." The objection was then sustained, and the plaintiff proceeded, evidently in accordance with the suggestion of the court, to prove a conversation with *Healy* in March about the Keating contract, his (plaintiff's) offer to advise him (defendant) about his contract, also an alleged conversation about October 31st concerning the Crosby offer and on the Monday

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morning following at his (plaintiff's) office, when the blue print was produced by *Healy* and advice given by plaintiff as to the price which defendant should demand of Crosby. The plaintiff followed this with proof of the conversations with *Healy* and Keating later when the contracts with Crosby were being discussed and drawn.

This evidence of agency on the part of Keating and personal conversations between defendant and plaintiff was followed by considerable evidence on the part of the plaintiff showing the advice given by him from time to time to Mr. Keating as to the manner of drilling, the depth of the holes, and generally what was best to be done, and this evidence was received by the court plainly on the theory that there had been *prima facie* proof made of request on the part of the defendant through the medium of Keating as his agent. Of course, it also tended to prove knowledge, but there can be no doubt that it was offered and received with the idea of proving request, and so we think the court was entirely right in submitting to the jury first the question whether Keating was authorized by the defendant to employ the plaintiff on his behalf, and, if so, whether he did employ him. That the plaintiff considered this question as a question in the case at the time of the trial is very evident from the following instructions which he submitted to the court:

"You are further instructed that if you find from the evidence that Thomas Keating was the agent of the defendant in relation to the handling, exploring, developing, and leasing of the *Healy* property, Keating's authority included whatever was necessary to effect the main purpose of the agency including the employment of a subagent, and the defendant is bound by such employment even though not expressly authorized by him.

"You are further instructed that if, as the agent of defendant, Thomas Keating employed plaintiff to perform services which were beneficial to defendant in respect to the property in question, the defendant is liable to the plaintiff for the reasonable value of such services whether or not Keating in-

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formed plaintiff that the services were in part for the benefit of defendant."

Perhaps it would have been better not to have used the words "contract of service" and "employment" so frequently as they were used in the charge, but in view of the very full and comprehensive instructions given later in the charge on the subject of a recovery in the absence of any express employment or contract, we are convinced that there could be no misleading of the jury thereby.

There is doubtless one error in the charge, namely, in the sentence which instructs the jury that in order to find that the plaintiff was employed to render service in the capacity of a mining expert the evidence should be *clear and convincing*. This cannot be approved. In a civil case the jury are required to be convinced or satisfied of the existence of a fact by the preponderance of the evidence (*Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077), except that in case of certain issues, including fraud, it is held that the affirmative can only be found upon evidence that is *clear and satisfactory*. *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074. The issue in the present case is not one of the issues included in the latter class, and hence it must be held erroneous to charge the jury that the evidence must be *clear and convincing*.

We are satisfied, however, that this error was entirely unsubstantial. The evidence that Keating ever employed the plaintiff to render *legal* services for *Healy* is very slight, and the evidence that such employment included employment as a mining expert is practically negligible. It seems extremely doubtful whether any recovery could be sustained on any theory except the theory that the plaintiff rendered valuable services to the defendant (through his agent, Keating) which were accepted by *Healy* knowing that they were being rendered and that they were not intended to be gratuitous. This phase of the case was very fully covered in the charge of the

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court by instructions which were favorable to the plaintiff and in fact included substantially every proposition which the plaintiff requested the court to give to the jury on the subject. It would be very hard to construct a more complete or favorable charge on the subject of liability resulting merely from the knowing acceptance of valuable services than the charge which the court gave. In our judgment the jury must necessarily have considered this as the only substantial issue in the case. The trial was long and characterized by eminently fair rulings; the plaintiff was permitted to place before the jury practically every material fact which he considered as bearing on his claim; the charge on the controlling issue was without error so far as plaintiff is concerned. There seems to us no probability and hardly a possibility of a different result upon another trial, and under these circumstances we entertain no doubt of our duty to affirm the judgment.

One sentence in the charge is complained of as a misstatement of fact, namely, the statement that the plaintiff did not claim that "such employment resulted from any conversation or dealing had with the defendant personally." With reference to this statement, it appears that at the close of the charge the defendant's attorney arose and stated to the court:

"There is one part of your honor's charge which if I understand it correctly is a little too favorable to the defendant in the case. Your honor stated that the plaintiff doesn't claim that any services were rendered to the defendant by virtue of express employment. The plaintiff did testify, however, that on the occasion immediately preceding going to Duluth to draw the leases he asked the defendant if he wished him to look after his papers, too, and that the defendant said he did. That was denied by the defendant and the witness Keating."

To which the court replied:

"I assumed that that was the situation, but I may be wrong. The jury has heard the statement of counsel; it only occurs

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in the statement of claims made by the parties, and if that is the evidence they may so consider it."

This seems to us to cover the only substantial inaccuracy there was in the charge of the court. Had there been any other instance which ought to have been noticed, it would seem that counsel for the plaintiff should have assisted counsel for the defendant in his effort to eliminate possible error from the charge. In any event, the present position of the plaintiff seems almost to justify the statement of the original charge. In the plaintiff's brief in this court it is said that "the plaintiff does not claim and the evidence does not show any request in fact for services or any contract in fact. It shows, and plaintiff's theory was, that he rendered services to defendant's agent with the knowledge of defendant, and also to defendant, which were accepted by each of them; and that *Healy* had secretly appointed Keating his agent, and therefore obtained services by fraud and is liable therefor."

We find no substantial error in the record.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on May 1, 1914.

ILLINOIS SURETY COMPANY, Appellant, vs. MAGUIRE, Respondent.

February 6—May 1, 1914.

Evidence: Sufficiency: Contracts: Validity: Indemnity: Suretyship: Fraud.

1. Parties to a contract may effectively provide for the kind or quantum of evidence necessary, in the absence of fraud, to conclusively establish a fact.
2. Thus, in a contract to indemnify a guaranty company for all loss sustained by reason of a bond executed by said company guaranteeing fidelity of an employee, a provision that "the vouchers

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or other proper evidence showing payment by said guaranty company of any such loss, . . . shall be conclusive evidence (except for fraud) . . . of the fact and amount" of the liability of the indemnitor to said company, was valid and binding.

3. Such contract did not make the indemnitor a surety upon the bond, and a waiver by the guaranty company of requirements in that bond as to notice and proof of loss by the employer did not, in the absence of fraud, release the indemnitor from liability.

4. A loss by the employer, covered by the bond, and payment by the guaranty company being clearly shown, a mere waiver of certain requirements of the bond and the absence of an indorsement by an indorsee of the employer on the check by which payment was made were not sufficient to establish fraud.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Action upon a contract of indemnity executed and delivered by the defendant to the plaintiff October 30, 1908. The contract reads as follows:

"Know all men by these presents, that I, *Emma L. Maguire,* of Pewaukee, Wisconsin, in consideration of the issue of a bond of guarantee by the *Illinois Surety Company* of Chicago, Illinois, to . . . on behalf of Walter R. Maguire, not yet of age, hereby agree that I will protect and immediately indemnify the said *Illinois Surety Company* against any and all loss, damage, or expense it may sustain or become liable for in consequence of such bond or any renewal or extension thereof, hereby admitting that the vouchers or other proper evidence showing payment by said guaranty company of any such loss, damage, or expense, shall be conclusive evidence (except for fraud) against me and my estate, of the fact and amount of my liability hereunder to said guaranty company. It being understood that, when the above named party reaches mature age, this obligation becomes canceled.

"(Signed) EMMA L. MAGUIRE."

Defendant admits that she signed the contract in order that her son might secure employment from W. A. Alexander & Company. On November 6, 1908, the plaintiff executed and delivered to W. A. Alexander & Company its bond in

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the sum of $500 indemnifying the firm against such pecuniary loss as it might sustain by any act of larceny or embezzlement on the part of Walter R. Maguire while engaged in performance of the duties of a cashier thereof. The bond contained, among other provisions, the following:

"That the employer, on his becoming aware of any act which may be made the basis of any claim hereunder, shall immediately give the company notice thereof by telegraph at the company's expense, and in writing by a registered letter, addressed to the secretary of the company, Chicago, Illinois, and shall, within ninety days after his so becoming aware of such act as aforesaid, file with the company its itemized claim thereunder at his own cost and expense with full particulars thereof duly sworn to; . . . and this bond shall become void both as to any existing or future liabilities thereunder unless the aforesaid notice shall have been given as provided for, and unless claim is filed within the time and manner above specified . . . That no one of the above conditions or provisions contained in this bond shall be deemed to have been waived by, or on behalf of, the company, unless the waiver be in writing, over the signature of an officer of the company."

On or about September 21, 1909, the above bond was duly renewed to cover a period ending October 23, 1910. August 29, 1910, Walter R. Maguire left the office and employ of W. A. Alexander & Company, without the knowledge of his employer, and did not return. On the same date his employer telephoned the plaintiff that Walter R. Maguire had disappeared and that he was short in his accounts in a sum exceeding the amount of his bond, and on August 31, 1910, W. A. Alexander & Company sent a letter, but not by registered mail, to the plaintiff informing it that W. R. Maguire had suddenly disappeared and that an investigation of his accounts indicated a shortage, the exact amount of which had not been ascertained, but that enough had been learned to show that it exceeded the amount of plaintiff's bond by a considerable sum. Later the plaintiff took the matter up

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with W. A. Alexander & Company and was advised by it that Maguire's shortage exceeded the amount of his bond; that Messrs. Fetzer and Dickey, partners in the firm of W. A. Alexander & Company, explained to the president of the plaintiff how Maguire had obtained large sums of money from them; that thereupon the plaintiff paid W. A. Alexander & Company, by check, the sum of $500, took a receipt for the payment, and also a written release from all further liability under the bond. The check was indorsed by W. A. Alexander & Company to the order of the Central Trust Company of Illinois. The latter payee does not seem to have indorsed it, but upon the back of the check is a rubber stamp, reading

"Paid through Chicago Clearing House
23
October 6, 1910
To the
Central Trust Company of Illinois."

James S. Hopkins, the acting president of the plaintiff, testified that the check came back to it in the ordinary course from the bank; that it was not delivered back to plaintiff by W. A. Alexander & Company, and that plaintiff actually paid the amount of $500 and never received anything back. W. E. Dickey, of the firm of W. A. Alexander & Company, also testified that plaintiff paid it $500. Defendant introduced no evidence to rebut or controvert any testimony offered on behalf of the plaintiff as to the existence of a shortage or as to the fact of the payment of $500 from plaintiff to W. A. Alexander & Company. The trial court found as a conclusion of law that the plaintiff at the time of giving the check was not legally liable to W. A. Alexander & Company on the bond given to them by the plaintiff for the fidelity of Maguire, and that the giving of the check by the plaintiff to W. A. Alexander & Company, or the receipt and release given by the latter to the plaintiff, did not make defendant liable to the plaintiff on her contract, and that the defendant was entitled

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to judgment dismissing the action. From a judgment entered accordingly plaintiff appealed.

For the appellant there was a brief by *Holt & Coombs,* and oral argument by *A. N. Coombs.*

For the respondent there was a brief by *Merton, Newbury & Jacobson,* and oral argument by *Ernst Merton.*

The following opinion was filed February 24, 1914:

VINJE, J. The trial court appears to have reached its conclusion that defendant was not liable because she was entitled to demand that all the requirements necessary to create a liability on the plaintiff's bond to the firm be complied with in order to render her liable; and that since no message by telegraph or registered letter was sent and no itemized claim was filed as required by plaintiff's bond, there was no liability shown on its part, and hence none on her part. Whether or not such conclusion is correct depends upon the meaning of the contract sued upon, and particularly upon that part thereof which reads, "hereby admitting that the vouchers or other proper evidence showing payment by said guaranty company of any such loss, damage, or expense shall be conclusive evidence (except for fraud) against me and my estate of the fact and amount of my liability hereunder to said guaranty company."

Plaintiff showed a *prima facie* case of loss in the amount of $500 resulting from the larceny or embezzlement of Maguire. It showed payment of such loss by a check, by a receipt, and by a release, either of which constituted a "voucher" showing payment within the meaning of the contract. It also showed payment by the oral testimony of a member of the firm of W. A. Alexander & Company. This testimony was "other proper evidence" showing payment by plaintiff within the meaning of the contract. If the provision of the contract referred to is valid, the plaintiff made out a case showing absolute liability on the part of defendant, unless it was impeached for fraud. That parties to a contract may

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effectively provide for the kind or quantum of lawful evidence necessary, in the absence of fraud, to conclusively establish a fact, cannot be doubted. *Guarantee Co. v. Pitts,* 78 Miss. 837, 30 South. 758; *American B. Co. v. Alcatraz C. Co.* 202 Fed. 483. But it is argued on the part of the defendant that the plaintiff, by waiving essential provisions in its bond to the firm, released her from liability. This would perhaps be so if she were a mere surety on that bond. Her liability, however, springs from an independent contract, and its provisions, in so far as they are lawful, control. By that contract she agreed that the fact of her liability and the amount thereof should be, except for fraud, conclusively established against her by vouchers or other proper evidence showing payment of loss by the guaranty company. The reason and reasonableness of such a provision are apparent. It is to obviate the necessity of litigating the question of plaintiff's liability on its bond, unless such liability is questioned on the ground of fraud, and to relieve the plaintiff from the necessity of proving every fact essential to show liability in order to make out a *prima facie* case.

The argument that fraud is shown by the evidence because of the waiver of certain requirements in plaintiff's bond, and the lack of indorsement of the check by the Central Trust Company of Illinois, is not tenable. The evidence of a loss by W. A. Alexander & Company and of the payment of $500 by plaintiff is clear and satisfactory and cannot be overcome by such mere alleged suspicious inferences. Fraud must be established by clear and satisfactory evidence. The right of plaintiff, in the absence of fraud, to waive the provisions referred to in its bond with the firm, is one the defendant cannot question under her contract with it, since she agreed that, in the absence of fraud, her liability should attach upon proof of payment of loss by plaintiff. No fraud was shown. It follows that the trial court erred in its conclusion that defendant was not liable.

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By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff.

A motion for a rehearing was denied, with $25 costs, on May 1, 1914.

VAN VALKENBURGH, Appellant, vs. CITY OF MILWAUKEE, Respondent.

SAME, Respondent, vs. SAME, Appellant.

October 31—November 18, 1913.
March 5—May 1, 1914.

Municipal corporations: Board of public works: Replacing defective sidewalk: Necessity: Determination, when conclusive: Width of walk: Mistake in order therefor: Correction: Assessment.

1. Where the board of public works of a city, acting within its authority, determines that a sidewalk is so out of repair that it should be replaced by a new one, such determination is conclusive if it rests upon any reasonable basis.
2. A city ordinance required that the sidewalk in a certain locality should be fifteen feet in width. The board of public works, in ordering a new sidewalk to be built by a contractor, did not specify its width but stated the area thereof, such area being sufficient only for a six-foot walk. The contractor actually constructed a fifteen-foot walk in conformity with the ordinance. *Held*, that the mistake in the order was a mere irregularity which could be corrected by the board of public works by providing for an assessment to cover the cost of the walk actually constructed.

APPEALS from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Action to recover the value of a quantity of lumber alleged to have belonged to plaintiff and wrongfully converted by the defendant to its own use; also to recover the amount of a sidewalk tax, alleged by the plaintiff to have been wrongfully assessed upon his property and paid by him under protest.

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The trial court found the facts to be as follows: During the times material to the case plaintiff was the owner of lots 15 and 16, block 6, in the Fifth ward of the city of *Milwaukee,* Wisconsin. May 29, 1908, said city contracted with one Markey to remove defective sidewalks in said ward. October 13th, thereafter, Markey, pursuant thereto, removed a wooden sidewalk in front of plaintiff's property. Defendant did not convert to its own use the plaintiff's lumber. By a city ordinance the sidewalk in question was required to be fifteen feet wide. The sidewalk alleged to have been wrongfully taken up was out of repair October 2, 1908. On that day Markey, under his contract, was duly ordered by the board of public works of said city to construct a cement sidewalk in front of plaintiff's property according to specifications. The order recited that the area of the walk to be constructed was about 480 square feet, rate eleven and three-eighths cents per square foot, and contract cost $54.60. The only order in the matter was the one containing such recital. Plaintiff was informed of the contents of the order soon after it was made. Pursuant thereto Markey removed the old and built the new walk. Thereafter the city engineer certified completion of the walk, reciting that it contained 1,133 square feet, costing, at the contract rate, $128.88, and with some extras, $134.88. Markey's claim for that amount was extended against plaintiff's property in the assessment roll of 1909 and was paid by him under protest. He demanded return of the money so paid before this action was commenced.

Upon such facts the court decided that plaintiff had no cause of action to recover for conversion of lumber, but that defendant had no authority to levy any sum against plaintiff's property for the cement sidewalk in excess of $54.60, and that he was entitled to recover his excess payment, to wit, $74.28, and costs. Judgment was rendered accordingly. Both sides appealed.

Frank B. Van Valkenburgh, in pro. per., for the plaintiff.

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For the defendant there was a brief by *Daniel W. Hoan*, city attorney, and *Clifton Williams*, special assistant city attorney, and oral argument by *Mr. Williams*.

The following opinion was filed November 18, 1913:

MARSHALL, J. Plaintiff challenges the finding of fact in defendant's favor as to the latter having appropriated the former's lumber which came from the old walk. If the court erred in respect to that, plaintiff should have had judgment for such lumber. He also complains of the finding to the effect that the old sidewalk was replaced by the new one because of the former being defective,—the theory being that, if the old sidewalk was in such good condition that there was no reason for replacing it other than because the board of public works favored cement walks, the displacement was illegal. Those matters are ruled in defendant's favor because the record does not satisfy us of the findings being against the clear preponderance of the evidence.

Assuming for the case that counsel is right as to the limit of authority to replace the old with new sidewalks, the record does not convince us, clearly, that the board of public works failed to observe such limitation. Whatever conditions precedent to the right of the board to act existed, in the absence of pretty clear evidence to the contrary, we must assume that it kept within the scope of its authority. So far as it was required to pass upon matters of fact, as for example whether the old sidewalk was out of condition, or its being out of condition was so liable to occur that its replacement by a new walk was reasonably necessary, its judgment is conclusive if it rests on any reasonable basis. To overturn such judgment would require a case showing a clear abuse of authority. However, here, as indicated, there is a finding that the old sidewalk, on the day when it was taken up, was defective and we do not see our way clear to overrule that decision.

The defendant's appeal challenges the recovery by plaint-

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iff of the amount of the tax paid under protest in excess of the sum appropriate to the order entered by the board of public works for construction of a cement sidewalk, containing about 480 feet. The jurisdictional requisite to the contractor legally constructing the sidewalk was the order entered by the board. His agreement with the city was to replace defective sidewalks with cement walks as he should be ordered in writing by such board. He was thus ordered as to a walk of about 480 feet, that being sufficient for a six-foot walk. It gave him no warrant for constructing a fifteen-foot walk. The trial court ruled correctly in limiting the right of the city to charge plaintiff's property for the contractor's benefit to the contract cost of the work he was ordered to construct.

Counsel denominates the call in the order made by the board of public works for a six instead of a fifteen-foot walk as a mere clerical mistake; and insists that it was in no sense jurisdictional. It may be that a six-foot walk was ordered when a fifteen-foot should have been, but the difficulty can hardly be called a clerical mistake. The order was a final discretionary act of the board of public works. It doubtless specified just what it intended to at the time. The contractor had no authority to proceed other than upon the order and was limited thereby. It is not perceived why he was not a mere voluntary actor as to whatever he did beyond the scope of such order.

By the Court.—The judgment is affirmed.

TIMLIN, J. (*dissenting*). By a city ordinance, which, when reasonable and within the legislative jurisdiction of the common council, has the same force as a statute, this sidewalk was required to be fifteen feet wide like other sidewalks in that part of the city. The board of public works ordered a sidewalk built without specifying the width, but in describing its area evidently computed this upon a width of six feet. The contractor built a fifteen-foot sidewalk as the ordinance required and the lotowner paid for the same and now sues to

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recover what it cost in excess of the erroneous computation contained in the order of the board of public works. By permitting a recovery on this technicality we give the plaintiff a sidewalk fifteen feet wide at the cost of one six feet wide, discriminate in his favor as against other abutting owners in his immediate vicinity, add to the embarrassments and difficulties of municipal governments; and then probably wonder why American city government has not been a success.

A motion for a rehearing in this action was granted February 3, 1914, and in deciding the case as resubmitted the following as the action of the court, was filed May 1, 1914:

PER CURIAM. When this cause was first disposed of there was no forgetfulness of decisions or of principles as regards sidewalks being required and construction thereof and payment therefor enforced under the police power. Counsel for the city are not at fault in any respect because of not having done their full work when the case was presented before. The facts were well understood; but the court was of the opinion that the sole authority of the contractor was the order of the board of public works to construct a sidewalk containing about 480 feet; that any construction beyond that was in excess of authority, and, therefore, the levying of a tax to pay therefor was in the nature of making a gift to the contractor which would not be legitimate. However, on reconsideration of the case, the court is constrained to hold that the order, substantially for a six-foot instead of a fifteen-foot walk, was a mere irregularity which it was competent for the board of public works to correct by providing for an assessment to cover the cost of the walk actually constructed and which the order to the contractor, but for inadvertence, would have called for. It seems that the ordinance under which the walk was relaid called for a fifteen-foot walk in case of a reconstruction. The contract for the construction contemplated the building of a walk in conformity to the ordinance in re-

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spect to the width. The contractor, upon receiving the notice under his contract, instead of taking note of the error therein and having it corrected before proceeding, constructed such a walk as the law required. The court inclines now to the view that the board had authority to rectify its own blunder by making the necessary assessment to pay for such a walk as the ordinance called for and which was, in fact, constructed and which the lotowner got the benefit of.

The judgment appealed from is, therefore, reversed, and the cause remanded with directions to dismiss the same with costs.

BOETTGER, Respondent, vs. CITY OF TWO RIVERS, Appellant.

December 10, 1913—January 13, 1914.
April 15—May 1, 1914.

Municipal corporations: Harbor improvements: Docks and breakwaters: Special assessments: Requisites and validity: Reassessment, when ordered: City not concluded by brief of counsel: Declaration as to purpose of work, when binding.

1. Under sec. 925—248*a*, Stats. 1911,—providing that any city may "construct, repair, improve and maintain any harbor within or of the city, so as to make it navigable and available for the largest class of vessels,"—the improvements which a city may make either wholly or in part at the expense of the adjacent property must be made primarily for the purpose of improving the navigation of the harbor and not for the purpose of preventing encroachment by the water upon such adjacent property.
2. That statute, when considered in its entirety, seems to contemplate somewhat extensive improvements to be made in accordance with a definite plan.
3. Although by the terms of said sec. 925—248*a* a city is given the option to proceed under it in lieu of proceeding under secs. 925—240 to 925—248, it can do so only where the work contemplated is of the character provided for in said sec. 925—248*a*, to wit, the making of a harbor "navigable and available for the largest class of vessels," and not in all cases where improvements might be made under such earlier sections.

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4. A special assessment under sec. 925—241, charging to abutting lots the expense of building or maintaining docks, requires for its support a proceeding by ordinance and a demand upon the lotowner and failure on his part to do the work; and the section itself is of doubtful validity, since it seems to contemplate charging the expense of the improvement to the property owner regardless of benefits.

5. Under sec. 925—248 a city may build a dock breakwater to protect land fronting on a harbor from being washed away, and may assess property benefited thereby, but it cannot build a commercial dock, if more expensive than a dock breakwater, and charge any part of such extra expense to the property so protected, or assess against such property benefits other than those resulting from the construction of a dock breakwater.

6. Under said sec. 925—248 the common council must itself first fix the boundaries of the district to be assessed, which is not confined to lands immediately abutting on the improvement but may include all lands which will in fact be protected by it; and thereafter the assessment may be made by the board of public works and confirmed by the council.

7. If the benefits do not amount to one half of the cost of the proposed improvement, the city cannot proceed under sec. 925—248, because it cannot levy to exceed one half the cost against the general property of the city.

8. Where a special assessment for a dock breakwater is held void because the city failed to comply with the law in making it, and not because of any inherent lack of power in the city to make an assessment for the improvement in question, a reassessment should be ordered under secs. 1210*d*, 1210*e*, Stats.; but where the city had no power originally to make an assessment for an improvement of the character ordered, there can be no reassessment.

9. The statute providing for a reassessment is mandatory, and where a case is within the statute and the city moves for a reassessment after the decision of the court is announced, it should not be concluded by a concession of counsel in a brief previously filed to the effect that if the assessment made was invalid no legal assessment could be made.

10. Where all the proceedings taken plainly indicated, and the resolutions of the city council unequivocally declared, that a proposed dock was to be constructed for the purpose of improving the inner harbor of the city, the expense of such improvement could not be assessed against abutting owners under sec. 925—248.

11. Even if, in such case, the declared purpose of the city council was not the real one, it should be bound by its declaration, and

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parol evidence (such as the testimony of the mayor and city engineer) was not competent to show that the purpose of the council was to build a breakwater to prevent the adjacent soil from being washed away.

12. Nor, in such a case, could a subsequent city council be permitted to declare that the former council had in fact a different purpose in view from that which it said it had, and then proceed to make an assessment of benefits and damages on the strength of such declaration.

APPEAL from a judgment of the circuit court for Manitowoc county: BYRON B. PARK, Judge. *Affirmed.*

For the appellant there were briefs by *F. W. Dicke* and *Nash & Nash,* and oral argument by *Mr. Dicke.*

For the respondent there was a brief by *Hougen & Brady,* and oral argument by *A. L. Hougen.*

The following opinion was filed January 13, 1914:

BARNES, J. A resolution of the city council of the city of *Two Rivers,* dated February 5, 1912, recited "that the public good and convenience demand the improvement of the inner harbor of the city of *Two Rivers* by constructing a new dock," along a line described, the distance being 612 feet. The board of public works was directed to assess benefits and damages. The plaintiff owned two lots abutting on the proposed dock and the benefits thereto were assessed at $720 each. The entire estimated cost of the improvement was $9,840, and it was determined to assess $3,868 of said sum against the city at large and the balance against the property benefited by the improvement. Plaintiff appeals from the assessment of benefits. It is conceded that the city attempted to proceed under sec. 925—248*a,* Stats., and that its proceedings were regular if the improvement was one which could be made under that section. The part of that section material to this case reads as follows:

"Any city may, at its option, in lieu of proceedings under sections 925—240 to 925—248, inclusive, have the power to

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construct, repair, improve and maintain any harbor within or of the city, so as to make it navigable and available for the largest class of vessels, by dredging channels and slips, building docks, dykes, wharves, piers and breakwaters or by such other plan of improvement as the council may prescribe and adopt; and when such improvement shall have been ordered the board of public works shall make the assessment of the benefits accruing to the lands benefited thereby."

Among other things the court found that it was necessary to construct a new dock or some other structure where the dock in question was built to act as a breakwater to protect the lots upon which it was built and the street adjacent thereto from being washed away by the waters of Lake Michigan and of the East and West Twin rivers in said city. The court further found that the work done did not affect the navigability of the harbor, and that, while the dock might have some commercial value and be used for dock purposes, it was in fact built as and for a breakwater to prevent further encroachment by water upon the shore at the point where the dock was constructed. As a conclusion of law the court found that no special assessment could be made under the section referred to for the improvement which was in fact made.

The evidence fully warranted the court in making the findings of fact, the substance of which has been set forth. The conclusion of law drawn therefrom would seem to follow as a matter of course. The improvements which a city may make under sec. 925—248*a* must be made primarily for the purpose of improving the navigation of the harbor and not for the purpose of preventing encroachment by the water on the land adjacent thereto, and the statute, when considered in its entirety, seems to contemplate somewhat extensive improvements to be made in accordance with a definite plan.

It is argued by appellant that the section in question gives a city the option to proceed under it in lieu of proceeding

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under secs. 925—240 to 925—248, and that therefore whatever improvements might be made under any of these sections may also be made under sec. 925—248*a*. This argument is not sound. A city council may proceed under sec. 925—248*a* in lieu of the other sections where the work contemplated is of the character provided for in sec. 925—248*a*, to wit, the making of a harbor "navigable and available for the largest class of vessels."

It remains to be considered whether the assessment can be sustained under the provisions of secs. 925—241, 925—242, 925—245, or 925—248.

The proceeding cannot be upheld under sec. 925—241. There must be a demand made upon the lotowner and a refusal on his part to comply with it before the city is empowered under that section to do the work and charge up the expense to such owner. There was no such demand here. The city did not even proceed by ordinance as the section requires. Besides, this section is, to say the least, of very doubtful validity inasmuch as it seems to contemplate that the expense of the improvement is chargeable to the property owner regardless of benefits. See *Lathrop v. Racine,* 119 Wis. 461, 97 N. W. 192.

Obviously neither sec. 925—242 nor 925—245 affects the situation. The first of these deals with improvements made at the general expense of the city, and the second with those made at the request of abutting property owners.

Sec. 925—248 reads as follows:

"In case it shall be necessary to protect any land from being washed away by any lake, river or other water the council may by ordinance provide for the protection of such land by a wall or dock breakwater, to be constructed as it may prescribe, and may direct the board of public works to make an assessment of the benefits accruing to the land so protected and other lands benefited by such wall. The boundaries of assessment districts shall be fixed and determined by the council. The cost of such protection shall be raised as follows: one half thereof, or such lesser proportion as the council

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shall direct and order, shall be paid out of the general fund or out of a special fund to be raised for the purpose, and the balance shall be levied and raised by the assessment of special benefits upon the real estate within the boundaries of the proper assessment district. The entire cost of protecting public grounds and the ends of streets shall be borne by the city. Such assessments shall be made, corrected, reported to the council and confirmed thereby the same as assessments for other public works, and certificates or improvement bonds may be issued thereon in the same manner and with like effect as in the case of other public works. An appeal to the circuit court may be taken from any such assessment, upon like notice and security, within the same time and with like effect as in the case of other public works, and like proceedings shall be had thereon."

The city might have proceeded under this section to build a dock breakwater to protect the land fronting on the river or harbor from being washed away and might make an assessment of benefits against the property benefited to help defray the cost of the improvement. The dock as built served as a breakwater and also as a commercial dock. Whether such a dock is materially different from or is more expensive than a dock built to serve as a breakwater only, we are not advised by the testimony and do not know. The city had no authority to build a commercial dock not built in aid of navigation at the expense of the adjacent lotowners simply because it was thought that more commercial dock room was needed. It could build a dock to act as a breakwater to prevent further erosion. The court does find that the dock built serves as a breakwater and that the primary purpose in building it was to protect the river banks. For a number of reasons the assessment as made cannot be sustained under sec. 925—248.

The city proceeded by resolution instead of by ordinance as that statute provides. This in itself might not be fatal to the assessment, but it is proper to mention it.

If it was more expensive to build the commercial dock constructed than it would be to build the dock breakwater pro-

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vided for by sec. 925—248, no part of this extra expense could be charged against adjacent property by way of a special assessment.

It is fair to assume that the board of public works in assessing benefits took into account that the abutting property was enhanced in value by reason of the construction of a dock that could be used for commercial purposes. Only such benefits could be assessed as would result from the construction of the dock breakwater provided for by the statute in question.

The statute requires the common council itself to fix the boundaries of the district to be assessed and does not contemplate that such district shall be confined to lands owned by abutting property owners if other lands will in fact be protected by the contemplated improvement, although the assessment may thereafter be made by the board of public works and confirmed by the council.

If the benefits do not amount to one half of the cost of the proposed improvement, the city cannot proceed under this section at all, because it cannot levy to exceed one half of the cost against the general property of the city. If the improvement made does not answer the call of the statute for a dock breakwater, of course no assessment could be made for it under this section, but we understand the decision of the trial court as holding that it does.

It follows from what has been said that the assessment made cannot be held valid under sec. 925—248 and that the trial court was right in setting it aside.

It is urged, however, that the judgment entered is erroneous and that the court should have entered an order staying proceedings in the action and directing a reassessment to be made.

It is in substance stated in the opinion of the court that counsel for the city conceded in a brief filed that if the assessment was not properly made under sec. 925—248 a legal

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assessment could not be made, and it may well be that by reason of such concession the matter of reassessment did not receive as careful consideration as it would otherwise have had. After the court announced its decision the defendant moved for an order directing a reassessment, which motion was denied. If the case made was a proper one in which to order a reassessment, the statute requiring such an order to be made is mandatory, and we do not think the appellant should be concluded by the position taken in its brief before the circuit court.

The improvement was made to prevent further washing of the river banks. A dock was built which in fact did prevent such washing. The city intended to assess a portion of the cost against the property benefited. Under sec. 925—248 the city could build a dock breakwater to protect the banks of the stream and make an assessment against property specially benefited.

Among other things, sec. 1210*d*, Stats., provides that, where a dock has been built and a special assessment has been made therefor and such assessment is void because done without authority of law or for failure to make the proper assessment of benefits and damages or for failure to observe any provision of law or because of any defect in the proceedings upon which the assessment is based, the city authorities shall proceed to make a new assessment of benefits and damages in the manner required by law.

Sec. 1210*e* provides that, in any action to set aside any special assessment for any of the purposes mentioned in sec. 1210*d*, if the court determines that such assessment is invalid by reason of a defective assessment of benefits or for any cause, it shall stay proceedings until a new assessment thereof be had in the manner hereinafter provided. Thereupon the proper city authorities shall proceed to make a new assessment of benefits and damages as required by law in the case of an original assessment.

The assessment made was void because the city failed to

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comply with the law in making it and failed to make a proper assessment of benefits, and not because of any inherent lack of power in the city to make any special assessment for the improvement. The case falls within the statutes last referred to and a reassessment should have been ordered.

So much of the judgment as adjudges the assessment as made to be void is correct and may be treated as the interlocutory determination provided for in such a case by sec. 1210*e*, Stats. The remaining portion of the judgment should be set aside and an order entered staying proceedings as provided for in said sec. 1210*e*. No costs will be allowed either party in this court except that appellant is required to pay the clerk's fees.

By the Court.—It is so ordered.

The following opinion was filed March 17, 1914:

PER CURIAM. A motion for a rehearing having been made by respondent in this case, and the court entertaining some doubt as to the correctness of so much of its former decision as directed a reassessment to be made,

It is ordered that the respondent within fifteen days from the date of this order and the appellant within ten days thereafter file with the clerk of this court briefs on the following questions, such briefs to be seasonably served on opposing counsel:

1. Might the resolutions of the common council of *Two Rivers* defining the work which it proposed to do be reasonably understood to mean that the contemplated improvement was intended to be made for the purpose of protecting the land adjacent to the proposed dock from being washed away?

2. Does the testimony of the city engineer and mayor furnish sufficient support for those portions of the sixth, eighth, and ninth findings of fact made by the court, wherein it is found that the dock in question was built for the purpose of

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preventing the land adjacent thereto from being washed away; and, if not, is there any other evidence to support the portions of these findings referred to?

3. If the purpose of making the improvement, as declared by the council, was one for which an assessment of benefits could not be made against abutting property owners without their consent, can a reassessment be ordered to enable the city to declare that the purpose first indicated was not the true one?

The following opinion was filed May 1, 1914:

BARNES, J. The court, by the sixth, eighth, and ninth findings of fact, found (1) that it was necessary to construct the dock in question to prevent the adjacent lots and street from being washed away; (2) that the dock had little effect upon the navigability of the river; and (3) that it was constructed for the purpose of preventing the lake from further washing away the land adjacent to the dock.

No attack was made on these findings by the respondent. They showed that such an improvement had in fact been made as was contemplated and provided for by sec. 925—248, Stats., under which an assessment of benefits and damages might have been made against adjacent property owners. Such an assessment was attempted to be made under sec. 925—248*a*, and it was held to be void because no improvement was made such as that section related to. The assessment made could not be sustained under sec. 925—248, because the provisions of that statute were not complied with in essential particulars in making the assessment.

It was thought, however, when the case was decided, inasmuch as the improvement made was the one provided for by sec. 925—248, for which a valid assessment might be made, and the council simply erred in the method pursued in making the assessment, that the reassessment statute was appli-

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cable, and a reassessment was ordered. If the premise was correct the conclusion was sound, because if jurisdiction to make a valid assessment existed and it was lost through blundering in the method of making it, the blunders might be corrected. Such is the purpose of the reassessment statute.

On respondent's motion for a rehearing, however, it was in effect argued that the findings referred to, although supported by the evidence of the mayor and city engineer and some other witnesses, should be disregarded because the city council by resolution designated the character of the improvement which it intended to make, and such designation is conclusive. We find an exception by respondent in the record, which, liberally construed, can be held to be an exception to the findings referred to; so the respondent may attack these findings in order to support the judgment entered.

Turning to the proceedings of the common council and of the board of public works, we find that the first resolution passed by the common council was as follows: "Resolved, that the board of public works are instructed to procure plans and specifications for docking the inner harbor of the city and the necessary dredging in connection therewith."

The second resolution read: "Resolved, that the public good and convenience demand the improvement of the inner harbor of the city of *Two Rivers* by constructing a new dock."

The report of the board of public works to the common council on the improvement made is entitled: "Report and estimate on harbor improvement." And recites: "The board of public works of the city of *Two Rivers,* to whom was referred the matter of the improvement of the inner harbor of the city of *Two Rivers* by the construction of a new dock along the established dock line, report."

The notice published by the board of public works is entitled: "Notice of an assessment for harbor improvement," which notice recites: "Whereas, the improvement of the inner harbor of the city of *Two Rivers* by the construction of a

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new dock on the north side of the west Twin River along the established dock line," etc.

The final report made by the board of public works referred to the proposed work as "the improvement of the inner harbor of the city of *Two Rivers* by the construction of a new dock on the north side of the west Twin River."

The notice of assessment recited that it was made pursuant to a resolution of the common council declaring that the public good and convenience demanded the improvement of the inner harbor. Other proceedings were had wherein the proposed improvement was designated in the same way, and we do not find in the record any intimation that the purpose of the council was to build a breakwater to prevent adjacent soil from being washed away.

These resolutions plainly indicate that the character of the work which the city had in mind was the improvement of the harbor rather than the prevention of erosion. These various resolutions amount to an unequivocal declaration that the improvement contemplated was an improvement of the inner harbor. Obviously the expense of such an undertaking could not be assessed against abutting owners under sec. 925—248. We have held, and we think correctly, that the improvement made was not the kind of an improvement provided for by sec. 925—248*a*.

The error in the former decision consisted in following the findings of fact made by the court and in assuming that the evidence referred to was sufficient to overcome that furnished by the record of the proceedings of the common council and of the board of public works. Obviously the best evidence of what the council intended is found in the resolutions which it adopted. Neither the mayor nor city engineer could be in a position to say that the council meant something different from what it said. The two kinds of public works, harbor improvements and land protection, are provided for by different statutory provisions, and, ordinarily at least, parol evidence is not competent to show that when one is specified

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the other is in fact meant. *Chippewa B. Co. v. Durand,* 122 Wis. 85, 103, 99 N. W. 603; *Bartlett v. Eau Claire Co.* 112 Wis. 237, 88 N. W. 61; *Nehrling v. Herold Co.* 112 Wis. 558, 566, 88 N. W. 614; *Duluth, S. S. & A. R. Co. v. Douglas Co.* 103 Wis. 75, 78, 79, 79 N. W. 34. The work done in fact was very properly and correctly described as a harbor improvement.

Not having the power originally to make a special assessment for the kind of improvement ordered, there is no power to make one now. It may well be that the declared purpose of the city council was not the real one, but it should be bound by its declaration. It would not be proper to permit the present city council to declare that the former council had in fact a different purpose in view from that which it said it had, and then proceed to make an assessment of benefits and damages on the strength of such declaration.

By the Court.—That part of the former mandate which ordered a reassessment is set aside, and the judgment is affirmed.

In all other respects the motion for a rehearing was denied, without costs.

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STATE EX REL. ATTORNEY GENERAL vs. NORTHERN PACIFIC RAILWAY COMPANY.

February 28—May 1, 1914.

EQUITY. *Remedies: Supersedure by delay: Discretion: Estoppel* in pais: *Limitation of actions: Permitting acts to be done* nunc pro tunc.

SUPREME COURT. *Original jurisdiction: Changing nature or form of proceedings.*

CORPORATIONS. *Annulment of charter: Increase of capital stock: Amendment of charter: Filing: Payment of fees: Enforcement by state: Railroad corporations: Special charters and general laws.*

1. Rights as regards remedies may, by countervailing equities, under some circumstances, be superseded as to the state.
2. The right of the state to a judicial remedy to forfeit a corporate franchise may be superseded by delay in connection with other circumstances.
3. Whether delay and characterizing circumstances are such as, upon equitable grounds, to supersede the remedy of the state to punish a corporation by annulling its charter for nonuse or misuse thereof, rests in sound judicial discretion.
4. The purpose of the original jurisdiction of the supreme court, which is invoked, in an application for the annulment of a corporate franchise, is to protect the general interests of the state and its people and, consistent with such purpose, use of such jurisdiction is not permissible where the result would be detrimental to such interests or unduly oppressive, notwithstanding, independently thereof, a transgression has occurred warranting the relief sought.
5. The original jurisdiction of the supreme court is not available to destroy a corporation of *quasi*-public character, to the manifest prejudice of a large number of persons not tainted with the wrong complained of, in the absence of clear wilful violation of law, affecting the very purpose of the corporate existence and there being no other way of redressing the wrong.
6. If an application is made for use of the original jurisdiction of the supreme court in a particular way, or for a particular purpose, which does not seem proper, the matter will not, necessarily, be dismissed; the petition or complaint may be retained for such proceedings as may be thought appropriate to the case and directions be given accordingly.
7. Exercise of the power to increase capital stock under sec. 1826, Stats., requires an amendment to the corporate charter, within

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the meaning of sec. 1820, Stats. *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80.

8. Sec. 1772, Stats., regarding fees on original stock of corporations or any increase thereof, applies to railroad corporations.
9. Aside from exceptions mentioned in sec. 1772, Stats., the legislative purpose was to include thereby all corporations as regards the obligation for payment of fees upon capital stock as to any corporation whether organized under ch. 86 or ch. 87 of the Statutes or an increase of capital stock of any such corporation or any existing under a special law.
10. The legislative response to the constitutional mandate for the enactment of laws to supply the place of prohibited activity as to granting corporate powers by special law was intended to be harmonious; bringing substantially into one system corporations organized under general laws and those organized under special laws.
11. Under the legislative plan for the creation of corporations under chs. 86 and 87, Stats., and the continued harmonious existence of corporations organized under special charters, all powers provided in the general laws for corporations created thereunder, including that to change fundamentals, were conferred on the corresponding class existing under special charters, and special rights inconsistent therewith, were superseded.
12. A change in the basic feature of a corporation is an amendment, in a proper sense, to its charter, whether so denominated in the written law or in the corporate proceedings to effect the change.
13. Every change in the fundamental features of a corporate charter of the class covered by ch. 87 and similar corporations existing under special laws, is an amendment within the meaning of sec. 1820, Stats.
14. Under sec. 1829, Stats., railroad corporations existing under special laws possess all the powers conferred upon similar corporations existing under general laws, subject to the same restrictions and duties as if their existence were referable to the latter, including the conditions of increasing capital stock.
15. An act of the legislature, specially incorporating into a special railroad charter which existed prior to the enactment of ch. 87, Stats., the provisions thereof as to increasing corporate stock, does not confer any new power on such corporation nor enlarge an old one.
16. An increase by a corporation of its capital stock by a method authorized by its charter, whether such charter be found in a special or general law or both, is a change in a basic feature of the organization by the execution of a corporate power, but none the less an amendment.

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17. Where the capital stock of a corporation shall have been fixed by its charter, whether resting in articles of organization under the general law or in a special charter, and the corporation possesses power to increase the amount of such stock, exercise of such power is conditioned by sec. 1772, Stats.
18. Mere delay by state officers to enforce performance of a duty imposed by law on a corporation does not preclude the state from enforcing such performance.
19. If the attitude of executive officers of the state be such as to efficiently influence a private corporation as to requirements to efficiently increase its capital stock, such circumstance will not create an estoppel *in pais* preventing the state from a change of attitude which does not impose any new burden on such corporation.
20. If a corporation fails to comply with the law as to making the record and paying the excise fee required upon increasing capital stock, because of excusable mistake in respect to the matter, but is ready and willing to strictly comply with such requirements as soon as known and conditions are created during the delay rendering annulment of the efforts to make such increase prejudicial to private and public rights,—the court may require the corporation to do, presently, what it neglected to do, seasonably, and without additional burden because of the delay and may give the late performance original validity by denying, upon equitable grounds, use of judicial remedies to any further extent.
21. There is no statute of limitations barring the state from compelling a railroad company to comply with the duties incident to its existence, including the provision as to changes in capital stock.
22. The judicial power upon equitable conditions to permit an act to be done *nunc pro tunc*, technically applies only to acts omitted to be seasonably done in judicial proceedings; but a court of equity has power, in the interest of justice, to permit things to be efficiently done, outside of judicial proceedings, and the exercise of such power is in the nature of granting a privilege to do the thing *nunc pro tunc*, and may properly be spoken of as such.
23. What may or may not be permitted by the court in the field of equity jurisdiction, is limited by the justice of the case and, with all parties before it or represented, the court, within the limits of fair judicial discretion, is the judge of the means and manner and the measure of redress.

[Syllabus by MARSHALL, J.]

WINSLOW, C. J., and BARNES, J., dissent.

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MANDAMUS action to compel the *Northern Pacific Railway Company* to file with the secretary of state duly authenticated papers showing an increase of its capital stock made July 1, 1896, from $5,000,000 to $155,000,000, and a second such increase, made the 7th day of January, 1907, from $155,000,000 to $250,000,000.

The state, in due form by its *Attorney General,* presented to the court a complaint in an action to secure a judicial forfeiture of the company's charter for breach of an alleged statutory duty to comply with the law as to doing that which this action is designed to compel it to do. Application to file such complaint and put defendant to its defense in respect to the matter was, in due form, brought on for hearing. The facts relied upon were these:

Defendant was incorporated, under the name of Superior & St. Croix Railroad Company, by ch. 326, P. & L. Laws of 1870. Sec. 15 of such chapter limited the capital stock to $5,000,000 with the privilege of increasing the same to any sum not exceeding $10,000,000. The charter was so changed by ch. 244, Laws of 1895, as to give the corporation power to increase its capital stock to any extent deemed advisable, as expressed by the holders of a majority of all stock outstanding, for the purpose of carrying on its business. Its existing powers under the charter of 1870 were confirmed. Additional powers were granted and it was declared that the corporation should have all "the rights, powers, privileges and immunities conferred upon railroad corporations by chapter 87 of the Revised Statutes of 1878 and the acts amendatory thereof and supplementary thereto," and it was made subject, except where inconsistent with the special charter, to the restrictions imposed upon railroad corporations by said ch. 87 and all amendatory and supplementary acts. Sec. 1829, R. S. 1878,—part of said ch. 87, and thus incorporated into defendant's charter,—made all existing and future railroad companies subject to the duties, liabilities, and restric-

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tions prescribed by said chapter. Sec. 1820, R. S. 1878,—part of said ch. 87, and, as aforesaid, made a part of defendant's charter,—required all amendments to articles of incorporation of railroad corporations to be filed in the office of the secretary of state.

Prior to the increase of stock, the aforesaid sections of the statutes being then in force, the name of defendant was changed by resolution of its stockholders and directors, in compliance with said sec. 1820 as to filing in the office of the secretary of state.

July 1, 1896, the corporation, under its new name, by due proceedings of its stockholders, determined and pretended to increase its capital stock to $155,000,000, thereupon issued certificates of stock for the increase, and has ever since treated such certificates as representing valid stock, though no evidence of such increase has been filed with the secretary of state.

January 2, 1907, the stockholders of the corporation, in like manner as before, pretended to increase its capital stock to $250,000,000 and issued certificates, accordingly, which it has ever since recognized as valid, though no evidence of such increase has been filed with the secretary of state. The resolutions adopted by the stockholders in each instance of increasing capital stock were amendments to the corporate articles.

By so pretending to increase its capital stock without complying with the laws of its creation and existence respecting filing as amendments to its corporate charter a duly authenticated copy of the resolution adopted to effect such increase, it usurped and continues to usurp franchises and exercise corporate power which it does not possess, and has offended, and continues to offend, against the laws of its being and existence.

The prayer for relief was that the corporation be required to answer by what authority it issued certificates of stock in

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excess of $10,000,000 and why judgment should not be rendered annulling its existence for its violation of law.

Attached to and made a part of the complaint, were copies of the resolutions aforesaid. By the first resolution authority to act in the matter was expressly made referable to the special power contained in the act of 1895, which was granted in the language, substantially, of sec. 1826, R. S. 1878, with some changes to make the same adaptable to the particular case, and was also made referable to said sec. 1826 and sec. 1829, R. S. 1878,—all of such provisions of law being incorporated *in extenso* into the resolution.

By the second resolution authority to act was also made referable to the general statutes as well as the express provisions of the charter though in general language.

The three provisions of law thus forming the legal basis for the two increases of stock and thus incorporated into the first resolution are as follows:

Ch. 244, Laws of 1895. "Section 10. Section 11 of said chapter 326 is hereby amended so as to read as follows: Section 11. The capital stock of said company may be increased from time to time to such an amount as may by its stockholders be deemed necessary for the construction, acquisition or operation of any of its railroad or railroads, by a vote of the owners of record of at least a majority of all its outstanding stock, in person or by proxy, at any annual meeting, or at any meeting called for that purpose, by a notice in writing to each stockholder," etc.

Revised Statutes 1878. "Section 1826. The capital stock of any such corporation may be increased to such amount as may by its stockholders be deemed necessary for the construction or operation of its road, by a vote of the owners of at least two thirds of all its stock, in person or by proxy, at any annual meeting; or at any meeting called by its directors for that purpose, by a notice in writing to each stockholder, to be served on him personally, or by depositing the same in the postoffice, postage paid, properly directed to him at the postoffice nearest his usual place of residence, at least twenty days prior to such meeting. Such notice shall state the time

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and place of such meeting, its object, and the amount to which it is proposed to increase such capital stock. No vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of all the stockholders voting therefor, and the amount of stock owned by each, shall be entered upon the records of such corporation."

Revised Statutes 1878. "Section 1829. All existing or future railroad corporations within this state, including such as were originally organized under chapter seventy-three of the revised statutes of eighteen hundred and fifty-eight, shall respectively have and possess all the powers and privileges, and be subject to all the duties, liabilities and restrictions prescribed by this chapter, and shall also have all peculiar rights and privileges granted to them respectively by their charters or any special law, not inconsistent with these statutes."

In opposition to the application defendant filed affidavits showing these facts:

In 1893, under a plan agreed upon by the owners of a large majority of the stockholders of the Northern Pacific Railroad Company, then insolvent, it became necessary to provide capital stock to the amount of $155,000,000 divided into $75,000,000 of preferred and $80,000,000 in common stock. That was accomplished by a sale of the property of the insolvent to defendant, an increase of its capital stock to $155,000,000 in 1896 and the issue of such stock in the acquirement of the property purchased. Such stock, and the additional stock issued pursuant to the second increase, were properly listed on the New York Stock Exchange and on other markets and have been dealt with ever since without any question being raised as to its validity until the application for leave to commence an action to annul the defendant's charter for failure to comply with the law in respect to the changes in the capital stock. Between the time of the first and the second increase of stock the number of stockholders increased from sixteen to upwards of 2,600. The stock has always been recognized as valid in the distribution of earn-

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ings to stockholders. Each year, since September 1, 1896, defendant has filed a report with the railroad commission of the state of Wisconsin. Such reports brought, promptly and fully, to the attention of such department the status of the defendant as regards capital stock, the issuance thereof, the purpose of the issue and the disposal of the proceeds in the original purchase and improvement of and additions to the property.

Attached to the affidavit and made a part thereof, was a copy of the plan for acquirement by the defendant of the property of the insolvent Northern Pacific Railroad Company and conversion of the bonds and stock of the old company and its subsidiaries into stock and securities of the defendant.

A further affidavit was presented showing that, yearly, since January 3, 1903, a report was filed by the defendant as to outstanding capital stock, both as to preferred and common, and, in particular, the fact that $155,000,000 in capital stock was issued during the period from 1896 to 1908, that the stock was listed on the New York Stock Exchange; that, commencing prior to 1902, the preferred stock had been called in and replaced by common stock, and that nearly the whole amount of $250,000,000 of the authorized capital stock or subscription receipts eligible to surrender for stock, there being but little of the latter, was outstanding. The report so filed with the Wisconsin tax commission included a statement of the total mileage of the defendant and each state in which a part of its system was located and other information, all of which was required by said tax commission in fixing the value of defendant's property in Wisconsin for the purpose of taxation. Its property was valued by aid of such reports and information and taxes were levied thereon and paid.

For reasons, briefly stated in the opinion, the application to annul the corporate existence of the defendant was denied; but, on the court's own motion, the complaint was retained

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and ordered filed as a petition for an alternative writ of *mandamus* in an action to put the defendant to its defense as to whether it should not do that which it was claimed it ought to have done.

An alternative writ of *mandamus* was accordingly issued, to which due return was made setting forth, substantially, the facts before stated as regards the history of the two increases of stock, the good faith of all transactions in respect thereto, the publicity of all proceedings and facts, particularly, as regards information furnished the administrative departments of the state and, further, this: The amount of defendant's capital stock since it acquired the property of the Northern Pacific Railroad Company has been a matter of public notoriety by means of reports made, year by year, to the state of Wisconsin and other states, the publication of such reports and otherwise. By ch. 193, Laws of 1899, the legislature expressly legalized the stock in question. Defendant did not do the things now insisted that it ought to have done because it was advised by its counsel, who were well learned in the law of the state of Wisconsin, that such laws did not require or authorize such things to be done, which it verily believed to be true and in good faith relied on. It never had any articles of organization or amended any such articles. Its increase of capital stock was accomplished in the exercise of a special power to do so in the way it was done, and not by way of amendments to its charter or any articles of organization. Since inheritance taxes were required under the laws of the state of Wisconsin all the capital stock of the defendant has been recognized by the state as legitimate and such taxes have been exacted and paid, accordingly, both as to resident and nonresident stockholders. During the seventeen years since the first increase of capital stock and more than six years since the second increase, no suggestion was made of any failure of duty in respect thereto on the part of defendant until shortly before the commencement of these proceedings. It would be inequitable, under the circumstances, to require

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defendant to do now what the state of Wisconsin through its law department claims it ought to have done as to the first increase of stock and at the same time be burdened with the condition as to payment to the state of one dollar per thousand dollars of the increase of stock, since when such increase was made no such condition was required to be complied with. Defendant claimed the benefit of secs. 4222 and 4229, Stats. 1911, and secs. 4229 and 4222, sub. 4, R. S. 1878, as having extinguished plaintiff's right now claimed, if it ever possessed such right.

There was a demurrer to the return and the issue therein joined was duly submitted.

The *Attorney General* and *Winfield W. Gilman,* assistant attorney general, for the plaintiff.

Charles W. Bunn, with *George D. Van Dyke* of counsel, for the defendant.

MARSHALL, J.

I.

The application for leave to commence an action in this court to annul defendant's corporate franchise, presented this proposition: Assuming that the remedy sought is appropriate under any circumstances which might be disclosed consistent with admitted facts, and that the statute as to changing the fundamentals of a railroad corporation, denominated an amendment in sec. 1820, R. S. 1878, applied to defendant when the occurrence happened which was intended to work an increase in the amount of its capital stock,—first to $155,000,000 and second to $250,000,000, and it, nevertheless, did not comply therewith by filing papers in the office of the secretary of state, evidencing the changes; but there was no intention of thereby defying the law, the defendant acting under advice of counsel and in good faith believing it possessed authority to make such changes in execution of a special charter power on the subject and the state, by silence, with full, or reasonable means of knowledge of the facts, ac-

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quiesced for nearly twenty years as to the first change and six years as to the second,—its departments taxing and dealing with defendant, regulating it and profiting by its expansion of capital,—thus by conduct impliedly assuring it and the public that the two efforts were legitimate and the new certificates represented valid corporate stock, and investors, relying thereon, have freely and publicly dealt therein, and no disadvantage to the state or its citizens will have accrued if defendant does, presently, what it should have done before issuing such certificates, while an annulment of its franchise would cause loss to many innocent individuals and be detrimental to public interests,—should this court permit its jurisdiction to be used as requested, in advance of a judicial determination of the disputed question, and, if in favor of the state, neglect by defendant to seasonably atone for its nonfeasance in such manner as judicially advised or directed, in case of its being held that responsibility in the matter has not been extinguished by laches or some statutes of limitation?

The foregoing states, briefly, the whole case as first presented. It does not follow as matter of course, that, because there is ground for forfeiture of a corporate franchise, this court should permit its jurisdiction to be used to that end. Rights as regards remedies may, by interfering equities, under some circumstances, be lost by the state as well as by individuals. It has no vested or inherent right in such matters which it may use unjustly and oppressively, being dependable, as it is, for vitality of such rights, upon the original jurisdiction of this court, which is said to be "unlimited in extent," "undefined in character,"—*Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081,—clothed with sovereign authority of the people,—so, necessarily, as limitless as the exigencies of situations requiring judicial interference. Such was the wise purpose of the framers of the constitution,—*State ex rel. Umbreit v. Helms,* 136 Wis. 432, 118 N. W. 158,—to create a power equal to all emergencies, to be

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used as sparingly as should comport with its dignity and the importance of the matter to be dealt with, and always to the end that justice might be done,—justice in the broadest sense, judicially cognizable, which may, and often does, rise above and render dormant remedies for vindication of strict legal rights.

The stated proposition seems to be decidedly ruled in defendant's favor by these principles. Time may be so characterized by circumstances as to estop the state from enforcing legal rights and require the court, in the exercise of sound judicial discretion, to refuse to open its door to an effort to that end.

An application for leave to use the original jurisdiction of this court to annul a corporate franchise, is addressed to sound judicial discretion and should not be permitted as to a going corporation, carrying out the design of its creation, performing duties of a *quasi*-public character, having to do with the daily necessities of a large number of people and involving large investments in which many innocent persons are pecuniarily interested in its undisturbed continuance, unless there is a clear, wilful misuse, abuse, or nonuse, of the franchise sought to be forfeited, or an intentional or inexcusable violation of law, striking at the very groundwork of the contract between the sovereign power and the corporation, whereby the latter fails to fulfil the very design and purpose of its organization, and there is no other way of adequately meeting the case.

Those principles are familiar and control any situation to which they apply. Whether the facts call for such application or not in any given situation, depends upon matters of fact to be evidentiarily established and judicially found, if not admitted. Activity of the power is fenced closely about by equitable principles, the objective, in each case, being justice, reasonable doubts, *inter partes,* to be resolved in favor of public interests. This court has many times applied these

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salutary principles; the significant instances being those relied upon by counsel for defendant. *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496, 66 N. W. 512; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Ashland v. Ashland W. Co.* 110 Wis. 94, 85 N. W. 695; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900. In the last instance cited it was given as the settled rule that "only when the action of the corporation is wilful should the attorney general be permitted to bring suit to annul its charter."

Thus it will be seen that the duty here, at the start, was plain. There was no wilful defiance of law,—only, at most, a good faith, nonnegligent mistake of law, in which the state as well as the corporation participated, without, necessarily, any real injury to the public. What the real right of the matter was, when the petition was presented, as at every point of time since the alleged nonfeasance occurred, was involved in such doubt that only this court could solve it and, though solved in favor of the state, such solution would not furnish any legitimate basis for discretionary activity of this court looking to an annulment of defendant's existence, in the absence of defiance of the thus established law and perhaps no way being open to adequately punish the corporation and vindicate the dignity of the law without serious detriment to the public and innocent proprietors of stock.

In the situation indicated, this court might have dismissed plaintiff's application and left the attorney general to proceed, at his convenience and as he might see fit, to seek redress in some other way; but, in harmony with the practice and policy to promote the most direct and speedy termination of controversies, practicable, especially where great public interests are involved, it used its authority, as regards the time and manner of affording use of its jurisdiction, by denying use thereof for the purpose requested; but retaining the petition as initiatory to appropriate proceedings to secure a judicial determination as to whether defendant had

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offended, as claimed, and, if so, whether it should repair the wrong by yet doing what it ought to have done, so far as practicable.

Thus,—fully reserving all questions on the merits as they might in the future appear, in case of defendant's conduct subsequent to determination of its duty being such as to render a second application for termination of its existence appropriate, a writ was issued, appropriate to such determination and to coercion, if need be or advisable, as to performance of such duty. This manner of retaining a subject matter once brought within the court's jurisdiction and speeding its judicial settlement, regardless of whether the manner of approach to the court be strictly appropriate or not, has become a matter of settled policy, to the end that justice be not delayed by want of co-operation here in securing a speedy termination of controversies, or hesitation in directing the proper proceeding to that end, shaping the direction to fit the exigencies of the particular situation, and without any necessary restraint by precedent.

II.

Whether the facts alleged on behalf of the state and conceded by defendant show that the latter violated the law as claimed is very much narrowed by *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846. Counsel for defendant, in harmony with its claim of good faith, appreciate the logic of that case and confess its authority; but maintain that there is a vital distinction between the situation there dealt with and the one before us.

These points of harmony between the former and present situation clearly exist: Sec. 1772, R. S. 1878, as to amendments to corporate charters did not, originally, apply to railroad corporations, nor was there any clear specific provision on the subject in the chapter relating to such corporations, nor any provision as to payment of a certain amount per

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thousand dollars in case of an increase of capital stock. That condition existed up to 1898, including the time when the first increase of stock was made. Sec. 1772, though in the chapter specially devoted to ordinary corporations, was then so changed as to make it apply to corporations in general as to payment of fees for increasing capital stock. The duty to pay was made incident to the increase, not to filing proof thereof. The language was, "and every corporation organized . . . under the laws of this state which may hereafter increase its capital stock shall pay as a fee therefor fifty cents for each one thousand dollars of increase," etc. Sec. 1772, Stats. 1898. In harmony therewith, sec. 1820, R. S. 1878,—as to formation of railroad corporations, which did not, originally, contain any provision for filing amendments to corporate articles with the secretary of state, but did as to original articles,—was changed by adding thereto this: "For filing such articles the secretary of state shall collect the fee prescribed in section 1772 for filing articles under chapter 86, and if amendments to such first mentioned articles are filed he shall collect the fee fixed by said section for filing amendments thereunder." Sec. 1820, Stats. 1898. The power of amendment was originally given by sec. 1826, R. S. 1878. It did not provide for filing proof of a change with the secretary of state. If such filing was required, it was by inference from the requirement as to original articles.

Thus it will be seen that by the change there was no express mandate to file proof of a change increasing capital stock, but such filing was referred to as something to be done as matter of course. Payment of the fee was not made incidental to the duty to file. In harmony with sec. 1772 it was made a duty incident to the act of increasing the stock.

The statutes were not, materially, changed thereafter until ch. 507, Laws of 1905. Thereby sec. 1772, as before, referred to railroads as well as other corporations, but payment of the charge per thousand dollars was increased to one dol-

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lar, and made incident to filing the amendments. That is to say, payment of the fee no longer waited upon filing the amendment, but capacity to file was made to depend upon such payment. In this condition, notwithstanding sec. 1826, as to increasing capital stock of railroad corporations, did not refer to proceedings to that end as involving an amendment to a corporate charter and, standing by itself, inferentially, provided that the vote to increase the stock should take effect upon a record thereof being made upon the books of the corporation, by retention of sec. 1772 conditioning the filing of amendments the same as to all corporations, and sec. 1820, treating the act of filing as a condition of exercising the power of amendment, and making sec. 1772, as to the particular matter, apply to railroad corporations,—exercise of the power granted by sec. 1826, was held in the former case, to, in fact, involve what was denominated an amendment in sec. 1820. The foregoing which seems plain and is conceded to have been rightly decided in *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846, is said by counsel for defendant not to apply now because it relates to changes in articles of incorporation which are required to be filed with the secretary of state and not to special corporate charters,—that the distinction between defendant and the corporation before is that the former is referable to its special charter, while the latter was referable to the general law under which there were articles of incorporation and amendments thereof with which the court had to deal.

As indicated, that the statute in 1898, dealt with all corporations as to conditions of increasing capital stock, there is no question. There is no mistaking the words "every corporation organized and doing business under the laws of this state which may hereafter increase its capital stock," etc. While perhaps the precise point now of whether that refers to railroads existing under special laws was not here before,

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it seems plain from what was then said as to the legislative idea of conditioning, as indicated, regardless of anything except the circumstance of organization and doing business "under the laws of this state," that it applies as well now as then. All were referred to. The legislature did not intend to make any favored class as regards the public record of changes in fundamentals and payment of fees. What was then said as to absurdity of burdening corporations organized under ch. 86 of the Statutes with the conditions mentioned in sec. 1772 and not those organized under ch. 87, applies quite as forcibly to burdening corporations organized under general laws with such condition and not those organized under special laws. The whole scheme was to put all, as to manner of changing fundamentals, particularly the pecuniary incident and the public record with the secretary of state, in a single class. On this branch of the case we can see no room for differentiating between the former situation and this one.

What has been said is emphasized by the fact that, in the general scheme for dispensing with the power to grant special corporate charters and providing for the organization of corporations under general laws, existing corporations, so far as practicable, were brought into harmony therewith by sec. 1829, in that it provided that they should "have and possess all the powers and privileges and be subject to all the duties, liabilities and restrictions prescribed by this chapter, and shall also have all peculiar rights and privileges granted to them respectively by their charters or any special law not inconsistent with these statutes." Thus all parts of ch. 87, including that in relation to changing the amount of capital stock under sec. 1826, and that in relation to filing amendments and the payment of fees under sec. 1820 and sec. 1772, were written into every special railroad charter. The full scope of the legislative purpose to thus put railroad corporations into one class so no subsequent special legislation would be needed to enable them to carry out the design of their cre-

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ation, cannot be appreciated without taking note of the fact that the effort was not to make the general scheme subservient to special charters, but was to make the latter bend to the former. After conferring all powers and privileges of the general scheme on corporations existing under special laws, subject to all the duties, liabilities, and restrictions of such scheme, the special rights and privileges were preserved only so far as not inconsistent with such scheme.

Counsel for plaintiff urge that such changes as those in question were not expressly provided for by the general law, and that it should be restrained to its particular subject. The purpose, the letter, and the spirit of the general law seem inconsistent with that view, as what follows with the foregoing seems to show.

The constitutional amendments adopted in 1871, prohibiting the granting of corporate powers and privileges, except to cities, sec. 31, art. IV, and commanding the legislature to "provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state," sec. 32, art. IV, led to the enactment of the general laws under consideration. It is evident that the legislative purpose was to create a comprehensive scheme covering the whole field,—to respond so fully to the constitutional mandate as to render special legislation, later, entirely unnecessary. That the essentials of a complete system were thought to include one for amending special charters without calling upon the legislature for special assistance, is quite manifest. That is particularly indicated by sec. 1790, in that it affords corporations of the kind mentioned in ch. 86 of the Statutes, but organized under special laws, power to amend their charters. That being so, it would be strange indeed if there were no such power in the companion scheme as to railroad corporations. The harmony and completeness of the scheme, evidently intended, suggests that. From an original

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standpoint, it seems most probable that the legislature considered that the constitutional command required it. Therefore is not the idea that such feature was omitted so very unreasonable as to be sufficient to move one to discover it by construction, if it be not discoverable in letter?

If we keep in view that a change in fundamentals is an amendment, regardless of whether it is called such or not, we will have little or no difficulty in perceiving that corporate power to amend special railroad charters was conferred quite as fully in the general law as to railroad corporations as such power was respecting ordinary corporations. 1st. Sec. 1820 refers to changes in fundamentals of railroad corporations as amendments; 2d. Sec. 1829 confers all powers granted by the general laws upon every existing railroad corporation, to be exercised subject to "all the duties, liabilities and restrictions prescribed" by ch. 87 of the Statutes, including the conditions of making amendments prescribed by sec. 1772 in connection with sec. 1820; 3d. Sec. 1831 confers power to build branch lines and make extensions, sec. 1832 power to make other changes in plan of road, and sec. 1835 to changing corporate name. Each applies to any corporation organized under the laws of this state; but before being exercised corporate action is necessary as in case of a change in fundamentals; 4th. A change under sec. 1826 by reference to sec. 1772 and sec. 1820, is required to be evidenced, as we have seen, upon the records of the secretary of state and a change under either secs. 1831, 1832, or 1835 is expressly required to be likewise evidenced.

Evidently we must survey the subject discussed from the viewpoint of the legislature when it responded to the command to provide by general laws for doing the business formerly done by special enactments. It was the granting of corporate power by special act, which was prohibited. The language is general. The legislature might well have supposed, probably did suppose, that to enlarge a corporate power

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of an existing corporation, or grant it a new power or privilege, essentially corporate, was within the meaning of "granting corporate powers or privileges." There is nothing in the laws passed to satisfy the requirement for a new system to indicate that special corporate powers were reserved by the constitution or by the general laws for unlimited special legislative interference.

We are not unmindful of what was said in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 528, as to the effect of the constitutional amendment of 1871 upon existing special charters. The precise point under consideration then was whether such amendment so limited sec. 1, art. XI, of the constitution as to power to alter or amend or repeal corporate charters that, as to existing charters, they could only be thus dealt with by general laws. The court felt bound to save such power, thought to have been designed to prevent corporate charters from being beyond legislative interference under the rule in the *Dartmouth College Case* (*Dartmouth College v. Woodward,* 4 Wheat. 518), if that were possible. So, by construction and logic which has not since been questioned, it was held that the reserved power was not affected by the prohibitory section. That was repeated in *Black River Imp. Co. v. Holway,* 87 Wis. 584, 59 N. W. 126. Whether such decisions mean that legislative power to act, specially, remains as to special corporate charters existing at the time of the amendment of 1871, unaffected thereby—revising the same, enlarging old powers, granting new powers, and even changing the original design so as, in practical effect, to make a new corporation,—the court has not yet ventured to say. The question was raised in *Att'y Gen. v. S. & St. C. R. Co.* 93 Wis. 604, 67 N. W. 1138, as to the charter now before us, but was not decided. We do not need to decide it now, though if it were necessary to the case, the radical change in defendant's charter would furnish opportunity to meet the question squarely. In any event, as we have before indi-

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cated, the letter and spirit of the general laws show a legislative purpose to cover, in a comprehensive way, the entire subject of creating and changing corporate charters, to engraft upon existing special charters all power obtainable by a new corporation, and to bring the old charters into harmony therewith by leaving surviving only such features thereof as were not inconsistent with the new scheme.

Now, how is the situation above indicated changed by the passing of ch. 244, Laws of 1895? It did not give the corporation any power which it did not possess before. Sec. 11 of the charter of 1870 was superseded by a section on an entirely different subject,—that of increasing capital stock,—which is, in the main and in the whole, as regards this case, a mere rewriting into the special charter of sec. 1826 which was there before by force of sec. 1829.

It is argued that what seems to be a mere change in form of the corporate power to change the character of the corporation as to the amount of capital stock, is a new power. We apprehend such claim would not be made except for the false premise, as it appears to us, that the provisions in the general statute as to changes in capital stock do not characterize the special charter. That the purpose was to write, unmistakably, the general statute provisions into the special charter, to all intents and purposes creating evidence of an existing condition, is evidenced by the fact that the old provision on the subject of capital stock was not retained and made to harmonize with the rewritten general law. It was dropped out and, at the end, expressly repealed, leaving nothing in the charter, for the time being, as to authorized capital stock, except, possibly, recognition of existing stock by the introductory words of the change: "The capital stock of said company may be increased." The purpose to retain the advantage of sec. 1820, sec. 1826, and sec. 1829 of the general laws, and "all the rights, powers, privileges and immunities conferred upon railroad corporations by" "chapter 87 of the Revised Stat-

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utes of 1878 and the acts amendatory thereof and supplementary thereto," . . . "save where inconsistent herewith, subject to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter and all amendatory and supplementary acts," is expressly declared. In that is a practical rewriting of the whole general statutory scheme for railroad corporations into the special charter. The clause "save where inconsistent herewith," does not point to the statutory scheme for amending railroad corporate charters because they consist with each other. The general repealing clause, phrased in the common form: "All acts and parts of acts inconsistent with or in any manner contravening the provisions of this act are hereby repealed" does not change the situation; 1st. Because it is evident that the legislative intent was to reach only the original charter and the acts amendatory thereof and not anything in the general statute; 2d. Because the general statutes on the subject of increasing the capital stock of railroad corporations are not inconsistent with the revised special charter; 3d. Those parts of the general law which were applicable to the special charters were expressly declared to be left undisturbed.

If what has been said were otherwise, it would be quite a grave question whether it is competent for the legislature to repeal the general law as to a particular corporation, putting that in a class by itself, so that, whereas all other railroad corporations would be powerless to change the amount of their corporate stock without complying with the general law as to filing proof of corporate action in the matter with the secretary of state and payment of an excise fee of one dollar per thousand dollars of the increase, the particular corporation may do so. It is not likely that the legislature thought of so discriminating. It would require manifest intent to warrant the court in holding that it did.

The manner in which defendant exercised its supposed power after the amendatory act of 1895 confirms what has been said. Such manner constitutes a striking practical con-

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struction of the revised charter in connection with the general law. Defendant did not venture, under the direction of eminent counsel, to change its capital stock, solely, with reference to its new special constitution. It grounded its action thereon in connection with secs. 1826 and 1829 of the Statutes, and, by necessary inference, upon sec. 1820 as well, providing, as we have seen, that changes in fundamentals of a railroad corporation as to amount of corporate stock shall be subject to sec. 1772 of the Statutes as to filing with the secretary of state and payment of the fee of one dollar per thousand dollars of the increase. How then can it be efficiently claimed that its act was in mere execution of a special corporate power and not an amendment? That such a change is an amendment, though not called such in sec. 1826 of the Statutes, is ruled, as we have seen, by *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846. What was there said on the subject applies just as clearly to the present situation. There seemed before, as there seems now, to be no way of escaping the conclusion that a change in the capital stock, in principle, is an amendment to the fundamentals of a corporation. The fact that it is so dealt with in sec. 1820 was thought there, as it is now, to be conclusive. The increase in the former case was in execution of a corporate power, referable to the general law, in the same sense as the one in question is the execution of such a power whether referable to the special charter, or the general law, or both. Where is the difference from any logical viewpoint? We cannot perceive any.

The reason of the statute as to filing proof with the secretary of state and payment of the excise fee does not rest in any mere name but the fact that it is a change in the fundamental features of the corporation. Can there be any doubt but what a fundamental change, whether made by the legislature directly or by the corporation itself by legislative authorization, is an amendment, whether called by that name or not? It matters not whether the constitution of the corpora-

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tion rests in special charter alone or in that in connection with the general law, and is called a charter, or in the general law in connection with a declaration containing in whole or in part recitations from such law, and denominated articles of incorporation. In either case the grant of corporate powers and privileges by sovereign authority is the substance of things. Regardless of what name is given to the grant, it is the constitution or charter of the corporation. Its capital stock being once fixed in amount, either by direct legislative action or by authorized corporate action, that is a fundamental feature of its organic act. If by another such feature it possesses a delegated authority to change the former, such a change, logically, must be regarded as answering to what is denominated an amendment in sec. 1820 of the Statutes, and conditioned for efficiency, as we have seen, upon compliance with such section, in connection with sec. 1772. Any other result, it seems, would be entirely out of harmony with the reasoning upon which the former decision was grounded.

The result of the foregoing is that it was the duty of defendant on each occasion of its increasing its capital stock, to file proof thereof with the secretary of state and comply with all conditions to validity.

So the pretended changes were not effectual. Let it be conceded, for the case, that it was competent for the state to waive performance of such duty or become estopped by conduct from insisting upon it; that there was no waiver seems plain, since there was no express or implied intention to waive. It would, in any event, take a very strong case to warrant holding that the mere negligences or mistakes of public officers constitute a waiver of performance of an important duty created for protection of the public interests. There was no known right here, there was a mutual supposition that the duty in question did not exist. If there is any fault in the matter it rests more at the door of the defendant than that of the state.

Is there any good ground for the claim that the state has

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lost its right to have the duty in question performed by laches? Estoppel rests in principle, whether, in the ultimate, the bar be called legal or equitable. That is elementary. If there be any branch of the law of estoppel which could in any event apply to this case, it is that of estoppel *in pais*. That is essentially equitable. The principle is this: He who acts, or fails to act when he ought to act, under such circumstances as to charge him with knowledge, that another to whom he owes a duty not to deceive, may probably rely thereon to his damage in case of appearances not being according to the facts, and such other does in good faith so rely, cannot thereafter change his position to such other's detriment. If one is silent when he ought to speak the law will close his mouth or turn a deaf ear to him when he attempts to speak. This principle is a powerful instrumentality of justice, displacing all others when it applies. It is said that, "It stays the operation of other rules which have not run their course, where to allow them to proceed would be a greater wrong than by permanently enjoining them." *Marling v. FitzGerald,* 138 Wis. 93, 120 N. W. 388; *Kimball v. Baker L. & T. Co.* 152 Wis. 441, 451, 140 N. W. 47; *Knauf & T. Co. v. Elkhart Lake S. & G. Co.* 153 Wis. 306, 141 N. W. 701.

Such an estoppel as the one under discussion goes no further than the reason for it,—to protect the party in whose favor it arises. Being based on equitable principles, countervailing equities, so far as they go, are to be considered.

In this case no damage could, in the natural course of things, accrue to defendant by reason of any fault of the state; conceding, for the point that there were such fault, other than such as would result from the increase of stock being held irremediably invalid. If the right to proceed to that extreme be waived, conditionally or coercively be put aside, there is no room left for any real damage to defendant unless it should be required to now comply with the statute as it presently exists, whereas had the duty been seasonably

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performed it would have happened when not burdened with the condition as to payment of the excise fee as to the first increase of stock. As to the second increase, amounting to $95,000, the burden would be no greater now than when the duty should have been performed, if only the face of the excise fee be required. In a balancing of equities, the defendant would then have a very substantial advantage, in that it would be enriched to the amount of the use of the $95,000 for a period of some seven years and the state would be correspondingly impoverished.

As to the first increase, to burden defendant with the condition of performing the neglected duty as the statute now is, would penalize defendant for the enrichment of the state in the sum of $150,000 on account of what seems clear to have been an innocent mistake in which distinguished legal advisers participated,—a mistake not involving anything more than mere error of judgment, after a careful professional study of the subject. There is no principle which requires or justifies that. The court charged with the duty of administering justice according to the equities of the case would not hesitate to deny relief which would mean such consequences, especially if the technical wrongdoer does not evince a disposition to defy the law when authoritatively declared, as seems to be the attitude of defendant.

It follows from what has been said, that the defendant should perform now, as it originally ought to have performed and without any greater burden than would have been incidental to performance then. The question has not been passed without thought of whether the value of the use of the excise fee of $95,000 which defendant has gained and the state has lost should be added to the amount the state should receive, and the duty of complying with the law not only be declared but performance only conditioned upon payment of such value in addition to the principal sum.

The value of the use of the deferred payment cannot well be exacted as interest upon a debt, nor can it be regarded as

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damages properly allowable on equitable principles for a wrong. There was no wrong in intention, actual or constructive. It is considered that the matter should be put upon the basis of an unliquidated claim, involved in such doubt and difficulty that defendant is excusable for not acting in the matter in advance of its legal status being judicially determined,—certainly not in advance of a demand. No demand was made until shortly before the commencement of these proceedings,—perhaps none except by filing the complaint charging a violation of law in respect to the matter. In such circumstances it is thought that defendant should not be penalized by being required to pay the value of the use of the delayed payment.

We have reached this point without needing to refer to authority outside our statutes and the decision in *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846. Construction of the statutes, the principles of the former decision, and familiar elementary principles, have seemed to be sufficient for guidance. Hence we have not burdened this opinion by referring to and discussing the many authorities with which the industry of eminent counsel has favored us.

We yet have the question of whether the state is barred by some statute of limitations from efficiently insisting upon performance of the neglected duty, so far at least as concerns the excise fee. This is not discussed in the briefs of counsel for defendant as to the second increase of stock. As to that laches only seems to be relied on as a bar, which, in our judgment, does not apply for reasons already sufficiently stated. We find nothing in the authorities cited out of harmony therewith.

Reference is made to sec. 4229 and sec. 4222, Stats. 1911, and sec. 4229 and sec. 4222, sub. 4, R. S. 1878, as precluding the state from insisting upon performance of the neglected duty as to the first increase. We are unable to find anything in either provision which deals with such a situation as we

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have here. It is unnecessary to refer in detail to the matters covered by such statutes. The right sought to be vindicated here is merely to have the defendant comply with a condition of its organic act, found in the general statutes forming a part of its charter, and in the latter as well. That is the primary right. It may be, and probably is, the fact that replenishment of the public treasury to some extent is the mainspring of present activity by the *Attorney General.*

However, the primary right and the remedy to vindicate it are not affected by the incidental benefit to the state of a pecuniary nature. Whether the incident be the main thing the *Attorney General* had in view, and the primary right a mere instrumentality to secure it, or the real right is the main thing and the incident is secondary, in fact as well as in purpose, makes no difference. The action of the *Attorney General* is conformable to his duty and commendable.

The idea is advanced that the first increase of stock, if invalid in the beginning, was validated by ch. 193, Laws of 1899. That was an amendment to sec. 1753 of the Statutes prohibiting the issuance of authorized stock for less than a money value consideration corresponding to the face of the stock. Its purpose was to cure defects in stock which had been put afloat in violation of such prohibition. It was not intended to cover an invalid increase of stock or an illegal change of any kind in corporate status. Neither does the act, in terms or spirit, have the remotest bearing on the situation in hand.

We have now considered all the points suggested in the return to the writ of *mandamus,* which seem to merit discussion, except one in respect to nature of the relief appropriate to the case. Prefacing with a brief recapitulation of the status as we find it, will suggest pointedly the nature of such relief. We have seen this:

Secs. 1820, 1826, and 1829 of the Statutes and all parts of the general law as to the power and government of railroad

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corporations and sec. 1772 as regards payment of an excise fee, in case of increasing capital stock, are parts of defendant's charter, both by mandate of the general law and that of the special act as well.

On the subject of increasing capital stock the special law and the general laws are in harmony. The change in capital stock in question answers to the calls of sec. 1826 and its nature is not affected by the fact that such section, in substance, was changed from a part of defendant's charter by force of the statute to a part thereof thereby and expressly as well.

The increases of defendant's capital stock are referable to sec. 1826 and the other sections of the statutes mentioned and were intended to be so, and have no different status when squared with the special law, than when with the general law.

An increase of capital stock of a corporation under a law as expressed in sec. 1826 of the Statutes, whether denominated an amendment or not is such in fact and is denominated such in sec. 1820 of the Statutes and treated as such in sec. 1772 of the Statutes.

The excise fee imposed by the statute as a condition of a valid increase of corporate stock, is an incident of a fundamental change in the corporate charter whether made directly by the legislature or by execution of a delegated power to make the change.

A change in the fundamentals of a corporation which it is empowered to make by a statutory method, is an amendment, and the result of the execution of a corporate power, whether such power rests in special or in general legislative grant.

The defendant breached its duty to the state in failing to file with the secretary of state proof of the proceedings in respect to each of the pretended increases of capital stock and neglecting to pay the excise fee of one dollar per thousand dollars as to the several increases.

Regardless of what might be the result of a further neglect to obey the law in respect to such increase of stock, since the

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neglect prior thereto has not been wilful nor negligent; but been characterized by good faith, as has also the neglect of the state in respect thereto, and no real damage to the latter or the public will result from such mutual neglect if defendant shall now perform the neglected duty, it should be permitted to do so.

The mere delay under the circumstances, does not involve waiver on the part of the state of the duty of defendant to obey the law nor estop it from insisting upon performance of such duty.

In the circumstances stated, the defendant should be permitted and required to do what it has heretofore neglected to do, and without any unnecessary increase of burden as a condition thereof and the late performance having the effect to validate the increased stock from the beginning by denying the use of judicial remedies to question it or by judicially declaring that the late performance shall have original validity.

As above indicated, the defendant should not be unnecessarily burdened in respect to performing presently the neglected duty. To the end that such end may be logically accomplished as well as that the late performance may clearly have original validity, may not the duty be now done *nunc pro tunc,* as the term is used in judicial proceedings? Counsel for defendant urge that such should be the termination of this litigation in case of conclusions being reached that it breached its duty as we have found was the case.

The *Attorney General* suggests that the power to require a thing to be done, *nunc pro tunc,* applies only to control by a court of its own proceedings with reference to acts done without the proper record having been made or some preliminary essential act being performed; that the court has no jurisdiction to apply that doctrine to such a case as this and thus supersede the requirements of the statute and control the administration by a state officer, who is not before the court and whose duties are prescribed by law.

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It is needless to review the authorities cited and others of the same sort respecting the nature and scope of judicial power to permit or order things to be done presently which might, or ought to, have been done before. There are a great variety of judicial sayings on the subject, showing much variety of views, including some suggesting an arbitrary limitation of the power and evidencing a very inadequate conception of the subject. Some of the authorities speak of jurisdictional aspects, and indicate that the only proper function of a *nunc pro tunc* direction is to permit or order correction of the court's records in harmony with things actually done without evidence having been created and preserved necessary to efficiency. Such suggestions are very misleading. It is a common thing for this court to treat a thing as done, where that course is essential to equity, which ought or might have been done, or order the particular thing to be done with original vitality, as for instance treat pleadings as having been amended in accordance with the evidence and so as to support the judgment, summarily, or order the amendment.

True, in general, and perhaps, technically, as it is understood in the law, the judicial function as to *nunc pro tunc* orders appertains to corrections in judicial proceedings. But courts, constitutionally given the broad jurisdiction vested here, possess inherent authority to do things within a very broad field which makes for justice between parties. It is not arbitrarily limited by precedent in respect to what may be ordered or permitted to be done, presently, with original validity, which ought to have been done before. In all such matters the court acts *nunc pro tunc* or in the nature of that. The mere name is of little consequence. The whole subject is within the field of equity wherein the power of this court is too broad for any one to safely venture to place any precise limits upon it.

There are few situations in which the court under its broad power cannot permit a thing to be done with original validity

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which, in its wisdom, is essential to the equitable conclusion of a matter in controversy of which it is possessed for adjudication, having jurisdiction over the parties. The power is one thing. Whether it should be exercised in any particular instance or not is quite another thing. The latter rests in the broad field of administrative discretion. Here all the parties concerned are before the court. The state invoked its jurisdiction and submitted to its authority. Neither party without the court's consent could withdraw the subject of controversy from that jurisdiction. The immediate administrative instrumentalities having to do with such subject, including the one designated by law to receive the filing and excise fee in case of a tender pursuant to the judgment of this court, are here, in legal effect. The hand of the court reaches as far as the necessities for execution of its judgment extends. All that is involved in the submission to the court's jurisdiction. Having become thus possessed of the matter, the court might, if justice seemed to require it, deny the relief sought, entirely, and in such a way as, in practical effect, to give original validity to the increase of stock. It might grant the relief asked on condition, or so grant it in part and deny it in part, or grant it on condition, giving full effect as regards benefit to defendant upon its doing all it could do to perform the conditions thereof,—though full performance were rendered impossible by some act or neglect of the adverse party,—by so acting upon representative instrumentalities of the real adverse party, as to save the people of the state in their sovereign capacity from being prejudiced by any obstruction to performance by defendant of the conditions imposed upon it, or otherwise shape the closing of the litigation as justice might seem to authorize or demand. In short, the power here, as said before, is as broad as the exigencies of the case. It is not fenced about by any arbitrary rule of law, written or unwritten, or rule of practice restraining the supreme rule that justice should prevail so far as that can reasonably be

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accomplished. Within that particular field and within the boundaries of reason, as the court may view the matter, it is the judge of the means, the manner, and the measure of redress,—to that end, justice always lighting the way. *In omnibus quidem, maxime tamen in jure, æquitas spectanda sit.*

Wherefore it is thus considered:

By the Court.—The motion to quash the alternative writ of *mandamus* is denied. A peremptory writ of *mandamus* is ordered to be issued requiring defendant to file as in the first writ required, and the state through its secretary to receive the documents required to be tendered and file the same on receipt of ninety-five thousand dollars ($95,000) as and for the excise fee of one dollar per thousand dollars of the second increase of stock; the filing and payment to have such original validity as regards the status of the two increases of stock as to preclude the state from using any remedy hereafter against defendant for its failure to seasonably perform its duty in respect to the two increases of stock.

WINSLOW, C. J. (*dissenting*). My brethren will, I am sure, acquit me of any intentional discourtesy when I say that it seems to me there is a fatal confusion of thought in arriving at the conclusion in this case.

This is not an action by the state to recover fees, but simply an action to compel the defendant to obey the statute requiring corporations to file a copy of each amendment to their articles of incorporation with the secretary of state. The state contends that the defendant has amended its articles of incorporation; the defendant contends that it has not. The question to be solved is therefore very simple, and it would seem that it ought to be very easy of solution when, as here, the evidentiary facts are not in dispute.

The defendant is not a corporation organized under the general railroad incorporation law, which requires the making and filing of articles of incorporation (as was the defendant

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in the case of *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846), but is a corporation created by special act of the legislature. Its "articles" are therefore legislative acts, it has no others. By its original act of incorporation the capital was limited to $10,000,000, but this act was amended by ch. 244 of the Laws of 1895, which provided that the capital stock of the company might be increased from time to time to such an amount as might by its stockholders be deemed necessary for the construction, acquisition, or operation of its railroad or railroads. This power has been exercised by the stockholders, and the question is whether by that act they have amended their articles of incorporation, *i. e.* their charter. There can be but one logical answer to this question, as it seems to me. The charter is exactly the same now as before. If one were now directed to print the articles of incorporation of the defendant, he would perforce print the charter in exactly the same words as he would have printed it if ordered to do so before the increase of capital stock. The stockholders have not committed the folly of attempting to change an act of the legislature,—they have simply exercised a privilege which the legislature gave them, and the law remains exactly as before. One does not change the terms of a power of attorney by doing what it authorizes. Not only have the articles of incorporation remained unchanged, but there is no power short of the legislature that can change them. The difficulties which the court experiences in the case seem to me to be the difficulties which always arise when one fails to give plain words their plain meaning.

BARNES, J. I agree with the foregoing dissenting opinion.

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KUCHLER, Administratrix, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

March 5—May 1, 1914.

Street railways: Negligence: Collision with vehicle: Gross negligence of motorman: Death of child: Contributory negligence of driver defeating recovery by parents: Agency.

1. In an action for the death of a boy alleged to have been caused by gross negligence of a motorman whose car struck the buggy in which the boy was riding, the evidence—showing, among other things, that the horse attached to the buggy was under perfect control and had slowed up or stopped before reaching the track, and that the driver urged it upon the track immediately in front of the rapidly approaching car with the expectation of getting across ahead of the car—is *held* not to have warranted a finding by the jury that the motorman was guilty of gross negligence.
2. The motorman had a right, under the circumstances, to presume that the driver of the horse, though only a few feet from the track, would stop and not make an effort to cross in front of the car.
3. To constitute gross negligence in such a case the act or omission causing the injury must have been wanton or wilful.
[4. Whether, although gross negligence was alleged and the case was tried as one based on gross negligence, plaintiff might have judgment upon the ground of ordinary negligence, is not determined.]
5. Where parents had intrusted their infant child to the care of his grandfather, and he was driving the horse at the time a street car collided with the vehicle and caused the death of the child, the grandfather was the agent of the parents and his negligence was their negligence, defeating a recovery for their benefit on the ground of ordinary negligence on the part of the motorman.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

This action was brought to recover damages occasioned by the death of a ten-year-old boy who was killed in a crossing accident at the intersection of Twelfth and Wells streets in the city of Milwaukee. At the time of the accident the boy

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was riding with his grandfather in a buggy going south on Twelfth street, and a west-bound street car on the defendant's north track on Wells street collided with the buggy. The accident occurred at 5:30 p. m. May 31, 1907.

The complaint charges gross negligence on the part of the motorman in operating and managing the car. Death as the result of the collision was admitted and other allegations of the complaint denied. The jury returned the following verdict:

"(1) While nearing and before reaching the crossing, did it appear to the motorman that in the absence of effort on his part a collision of his car with the horse and buggy was inevitable? *A.* Yes.

"(2) While nearing the crossing and before reaching the point of collision, did the motorman intentionally refrain from making any effort in good faith to slacken the speed of his car? *A.* Yes.

"(3) Was the death of deceased caused by wanton and wilful conduct of the motorman indicating a conscious disregard of the safety of others? *A.* Yes.

"(4) If you answer either or both question 2 or 3 'Yes,' then answer: Was such conduct the proximate cause of the death of the deceased? *A.* Yes.

"(5) What pecuniary loss was sustained by the parents of John Kuchler in consequence of his death? *A.* $4,052.80.

"(6) What part of the above sum represents the pecuniary loss sustained by the father of said deceased? *A.* $45."

The usual motions were made by the defendant for an order changing the answers in the special verdict and for judgment upon the verdict as changed, and for judgment in favor of the defendant upon the uncontradicted evidence and notwithstanding the verdict, and for a new trial, all of which motions were denied. The court held the damages excessive and ordered that a new trial be granted unless the plaintiff within twenty days remitted from the verdict the sum of $2,052.80. Plaintiff remitted and judgment was entered accordingly, from which this appeal was taken.

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The cause was argued on November 19, 1913:

For the appellant there were briefs by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *James D. Shaw.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

Afterwards the court directed the filing of further briefs upon the question whether the negligence of the driver of the vehicle with whom the infant was riding at the time of the injury is imputable to the infant. Briefs were accordingly filed on March 5, 1914, and the following opinion was filed on May 1, 1914:

KERWIN, J. The main question presented here is whether there was sufficient evidence to carry the case to the jury on the issue of gross negligence of the motorman operating the car. Under the decisions of this court, in order to make a case of gross negligence it must appear that there was wilful misconduct on the part of the motorman. His conduct must have been such as to suggest that he was wholly indifferent as to the safety of the occupants of the buggy, and was guilty of such wanton or reckless conduct as is deemed equivalent to an intent to injure. *Haverlund v. C., St. P., M. & O. R. Co.* 143 Wis. 415, 128 N. W. 273; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Fox v. C., St. P., M. & O. R. Co.* 147 Wis. 310, 133 N. W. 19; *Raasch v. Milwaukee E. R. & L. Co.* 151 Wis. 170, 138 N. W. 608; *Willard v. C. & N. W. R. Co.* 150 Wis. 234, 239, 136 N. W. 646; *Barlow v. Foster,* 149 Wis. 613, 136 N. W. 822.

To constitute gross negligence the act or omission causing the injury must itself have been wanton or wilful. *Gould v. Merrill R. & L. Co.* 139 Wis. 433, 121 N. W. 161; *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672; *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090.

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At the time of the injury the defendant was operating a double-track street railway on Wells street from Eleventh street westward. Cars running north on Eleventh street entered a curve and swung westward on Wells street. The intersection of Eleventh and Wells streets is a transfer point. The accident occurred at the intersection of Twelfth and Wells streets, one block west from Eleventh street. The car which collided with the buggy in which deceased was riding came north on Eleventh street, turned west on Wells street, then continued west on the north track on Wells street. The deceased was riding with his grandfather in a buggy going south on Twelfth street. The horse was going on a slow trot as it reached Wells street, but slowed up or stopped on the crossing when about twenty feet from the north street-car track on Wells street, then proceeded slowly, and when about four or five feet from the track the car which collided with the buggy was about twenty feet east of the place of collision. The horse and buggy proceeded onto the track immediately in front of the car and the car struck the front wheel of the buggy. The horse was under perfect control of the driver. It appears from the undisputed evidence that deceased was in danger only two or three seconds before the collision. It also appears from the evidence that when the horse got within four or five feet of the track the driver struck it with the reins and tried to get across the tracks quickly. There is some conflict in the evidence as to the speed of the car, but it is established that it was going at a "pretty good speed."

It is quite clear from the evidence that the horse stopped or slowed up to a walk about the time of entering on Wells street, and afterwards, when only a few feet from the north track, the driver urged the horse onto the track immediately in front of the approaching car with the expectation of getting across ahead of it.

In view of the speed of the car and the horse just before the collision, the wilful misconduct of the motorman, if any, upon the undisputed evidence must have occurred within two

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or three seconds before the collision. There is no evidence which would have justified the jury in finding that it occurred during that time. The motorman had a right to presume that the driver of the horse, though only a few feet from the track, would stop and not make an effort to cross immediately in front of a rapidly approaching car. *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *McCabe v. Milwaukee E. R. & L. Co.* 156 Wis. 621, 146 N. W. 806.

In principle the instant case is quite similar to *McCabe v. Milwaukee E. R. & L. Co., supra,* where the deceased attempted to cross in front of the car and was killed, and this court held that there was no evidence to support a finding of wilful misconduct on the part of the motorman. Upon a careful examination of the record we are convinced that there is no evidence of wilful misconduct on the part of the motorman in the present case.

The case was tried on the theory that the motorman was guilty of gross negligence. It is now insisted, however, that no contributory negligence was shown, therefore a recovery may be had on the ground of ordinary negligence. This contention is made upon the theory that the negligence of the driver of the horse cannot be attributed to the deceased, under the doctrine of *Prideaux v. Mineral Point,* 43 Wis. 513, and other cases in this court, because it is argued that the doctrine of these cases is based upon the principle of agency, and there could be no agency between the infant, deceased, and the driver. It is claimed that, although this case was tried as one based upon gross negligence, judgment may go for respondent upon the ground of ordinary negligence, under the rule of *Astin v. C., M. & St. P. R. Co.* 143 Wis. 477, 128 N. W. 265. We need not consider this point, because we are convinced that the plaintiff is chargeable with the contributory negligence of the driver, the grandfather of deceased.

This action was brought by the father of deceased as bene-

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ficiary, and upon his death continued in the name of the mother. It appears that the beneficiaries, the father and mother, intrusted the infant, deceased, to the care of his grandfather, who was driving the horse at the time of the collision. The grandfather was therefore the agent of the beneficiaries and his negligence their negligence.

Assuming, without deciding, that the motorman was guilty of ordinary negligence, the beneficiaries through their agent were also guilty of contributory negligence, therefore cannot recover. It is clear that the plaintiff here is chargeable with the negligence of the driver. *Bellefontaine & I. R. Co. v. Snyder,* 18 Ohio St. 399; *Williams v. Gardiner,* 58 Hun, 508, 12 N. Y. Supp. 612; *Schlenks v. Central P. R. Co.* 15 Ky. Law Rep. 409, 23 S. W. 589; *North Pennsylvania R. Co. v. Mahoney,* 57 Pa. St. 187; *Gress v. P. & R. R. Co.* 228 Pa. St. 482, 78 Atl. 810; *Bamberger v. Citizens' St. R. Co.* 95 Tenn. 18, 31 S. W. 163; *Paige v. N. Y. C. & H. R. R. Co.* 111 App. Div. 828, 98 N. Y. Supp. 183; *Chicago & N. W. R. Co. v. Schumilowsky,* 8 Ill. App. 613; *Baltimore & O. R. Co. v. State,* 30 Md. 47.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the complaint.

SIEBECKER, J., took no part.

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COVAULT, Respondent, vs. NEVITT, by guardian *ad litem*, Appellant.

March 16—May 1, 1914.

Infants: Liability for torts of employees: Contracts: Validity: Necessaries.

1. An infant owner of property is not liable *respondeat superior* for the negligent act of a person in his employment and in charge of the property, where the infant in no way personally participated in such act.
2. An infant cannot make a valid contract appointing an agent or employing a servant.
3. A contract under which a person was employed by an infant as janitor to care for the infant's store building was not a contract for necessaries under which a liability could be enforced not for the benefit of the infant.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action against an infant to recover for negligence of servant. The complaint, among other things, alleges that the defendant, an infant, owned real estate on a public street in the city of Oshkosh upon which there was a store building abutting on the street; that the defendant maintained trap doors in the sidewalk opposite said premises; that defendant had in his employ one Powers, who was janitor of said store building and who used the trap doors as means of ingress and egress from the basement of the building; that on November 16, 1912, said servant, while performing his duties as janitor, negligently raised and opened said trap doors; "that said servant failed and neglected to give any warning or notice of the intended raising and opening of said trap doors as aforesaid to possible pedestrians who might be lawfully walking along said public sidewalk at said time;" that "wholly because of the negligent manner of raising and opening the trap doors aforesaid, by defendant's servant, as hereinbefore set forth, plaintiff was tripped, causing her to fall against the sidewalk with great force and violence."

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The defendant demurred to the complaint for the reason that it appeared upon the face thereof that it did not state facts sufficient to constitute a cause of action. The court below overruled the demurrer with leave to the defendant to answer upon payment of $10 costs. The defendant appealed from the order overruling the demurrer.

The cause was argued on December 9, 1913:

For the appellant there was a brief by *Thompson, Thompson & Jackson,* and oral argument by *Carl D. Jackson.*

For the respondent the cause was submitted on the brief of *Earl P. Finch* and *Frederic J. Eaton.*

Further briefs were ordered by the court and were filed on March 16, 1914. The following opinion was filed May 1, 1914:

KERWIN, J. The question presented is whether an infant owner of property is liable *respondeat superior* for the negligent act of a person in the employment of the infant and in charge of such property where the infant in no way personally participated in such act. The contention of counsel for appellant is that he is not liable, for the reason that he cannot appoint an agent, and that while he may be held for torts committed by himself he is not liable for the torts of one acting for him in his absence and without his direction or consent.

On the part of the respondent it is insisted that the defendant is liable upon the ground that the party who committed the tort was in the discharge of a lawful duty for the defendant, in the course of which he committed the tort, therefore the defendant is liable. It is true that an infant may be liable for his personal torts. But it seems to be well settled that an infant cannot be made liable for the torts of one acting for him, because he has no power to appoint an agent or servant and thereby create the relation of master and servant. The liability of a master for the torts of his servant rests on

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contract existing between master and servant, and an infant having no power to contract cannot be held for the torts of the servant. 1 Cooley, Torts (3d ed.) 188; 22 Cyc. 514, 620; 16 Am. & Eng. Ency. of Law (2d ed.) 308; Reeves, Dom. Rel. (3d ed.) 519; 26 Cyc. 968; *Burns v. Smith,* 29 Ind. App. 181, 64 N. E. 94; *Cunningham v. Ill. Cent. R. Co.* 77 Ill. 178; *Sikes v. Johnson,* 16 Mass. 389; *Schenk v. Strong,* 4 N. J. Law, 87; *Lowery v. Cate,* 108 Tenn. 54, 64 S. W. 1068; *Hampel v. D., G. R. & W. R. Co.* 138 Mich. 1, 100 N. W. 1002; *Smith v. Kron,* 96 N. C. 392, 2 S. E. 533; *Prescott v. Norris,* 32 N. H. 101; Roberts, Wallace & Graham, Duty and Liability of Employers, pp. 60, 67; Wood, Mast. & Serv. (2d ed.) secs. 4–6; *Burnham v. Seaverns,* 101 Mass. 360; *Armitage v. Widoe,* 36 Mich. 124; *Holden v. Curry,* 85 Wis. 504, 55 N. W. 965.

Cooley states the rule concisely thus:

"As the doctrine *respondeat superior* rests upon the relation of master and servant, which depends upon contract, actual or implied, it is obvious that it can have no application in the case of an infant employer, and he, therefore, is not responsible for torts of negligence by those in his service. Nor can he be made a trespasser by relation through the ratification of a wrongful act which another has assumed to do on his behalf, but without his knowledge." Cooley, Torts (3d ed.) 188.

In order to create a liability here there must not only be a valid contract between defendant and the janitor, but the acts of the janitor must be in the line of his employment under the contract. The doctrine of *respondeat superior* rests upon the performance of duty in the course of employment, and such duty rests upon contract. *Kumba v. Gilham,* 103 Wis. 312, 79 N. W. 325. In order to make one liable for the tort of another the relation of master and servant must exist. *King v. N. Y. C. & H. R. R. Co.* 66 N. Y. 181; *Burns v. Smith,* 29 Ind. App. 181, 64 N. E. 94. The general rule is that, "Since an infant cannot create an agency or

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appoint a servant, and therefore cannot delegate powers to another, he cannot guarantee or insure the fidelity, care, or skill of such other." 22 Cyc. 620, and cases cited.

It is clear that in the instant case the alleged contract could only be sustained, if at all, upon the ground that it was a contract for necessaries; and it is equally clear that such a contract is not a contract for necessaries. 22 Cyc. 584, 585; Hollingsworth, Contracts, p. 31; 16 Am. & Eng. Ency. of Law (2d ed.) 276.

The general rule respecting necessaries is that they must be such as to supply the personal needs of the infant. *Tupper v. Cadwell,* 12 Met. 559, 562. Manifestly the contract in this case is not a contract for necessaries under which a liability could be enforced not for the benefit of the infant. It has been held that repairs or improvements of a minor's real estate under certain circumstances are not necessaries for which the minor can be held liable. 22 Cyc. 595; *Tupper v. Cadwell, supra; Price v. Sanders,* 60 Ind. 310. And it has been held that a materialman furnishing material to a minor for use in a building can have no lien therefor. *Hall v. Kjer,* 47 N. J. Law, 340; *McCarty v. Carter,* 49 Ill. 53; *Wornock v. Loar,* 11 Ky. Law Rep. 6, 11 S. W. 438; *Bloomer v. Nolan,* 36 Neb. 51, 53 N. W. 1039; 2 Jones, Liens (2d ed.) § 1239. By citing the foregoing cases we do not approve them in every particular, nor do we pass upon the question whether a lien would exist under any circumstances, but cite the cases as showing to what extent courts have gone upon the subject.

Even if the alleged contract of janitorship in question were executed it would not be binding on the minor if he were not benefited by it, and if benefited only to the extent of the benefit. 22 Cyc. 583; *Ryan v. Smith,* 165 Mass. 303, 43 N. E. 109.

If the alleged contract were voidable it could be repudiated at any time before the defendant arrived at the age of twenty-

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one years. It is clear from all the authorities that upon the allegations of the complaint the alleged contract between Powers, the janitor, and defendant could not render defendant liable for the tort of Powers. The defendant had no connection with the alleged tort committed by Powers; had no knowledge of it until after it was committed; neither created nor maintained any nuisance upon the property which in any way contributed to the injury. Upon the facts admitted by the demurrer the acts complained of are solely the acts of the janitor, hence no liability is shown against the defendant. Beven, Workmen's Compensation (4th ed.) pp. 281, 282, and cases cited. The cause of action set up in the complaint is the alleged negligence of Powers, the janitor. The liability of the defendant, as claimed by plaintiff, rests upon the doctrine of *respondeat superior,* and, as we have seen, no liability exists upon that ground. That an infant may be held on a contract for necessaries received by him to the extent of the benefits, and that some contracts of an infant are voidable and not absolutely void, and that infants are liable for torts committed by them personally, may be conceded, and authorities upon these propositions need not be discussed.

The question here is whether a valid contract creating the relation of master and servant between the infant and his alleged servant can be made. We think it clear that it cannot. True, as held in *McCabe v. O'Connor,* 4 App. Div. 354, 38 N. Y. Supp. 572, cited by respondent, an infant may be held liable for maintaining a nuisance upon his property, for that is his personal tort. Other cases are cited by respondent which involve the question of personal torts by the infant. But in the case at bar the complaint is specifically grounded upon the tort of Powers as servant of the defendant.

It is contended by respondent that an infant may appoint an agent to do an act which is clearly to his advantage, citing Story, Agency, § 6; Mechem, Agency, § 54; and Ewell's

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Evans, Principal & Agent, p. 13. The rule of these authorities is based upon cases of benefits received by the infant and the necessities of the case. Story on Agency, § 6, lays down the doctrine that infants are incapable of either wholly or partially appointing an agent, and that an infant cannot authorize one to do an act which is to his prejudice. Ewell's Evans on Principal & Agent, pages 12, 13, and 14, refers to the rule laid down by Story and also to the "Infants' Relief Act, 1874," 37 & 38 Vict. c. 62.

It has been held that an infant might appoint an agent to do an act unquestionably to his advantage—as to receive seisin of an estate conveyed to him. The reason of the rule is based upon the advantage received and the necessities of the case. Suppose an infant should appoint an agent to purchase necessaries and the agent should purchase and convert them to his own use; could the infant be held liable for the purchase price? Or suppose the agent agreed to pay double what the articles purchased were worth; could the infant be compelled to pay the agreed price? We think not.

It is argued that in any event the contract between Powers and the defendant is voidable only and not void. On this proposition *Patterson v. Lippincott,* 47 N. J. Law, 457, 1 Atl. 506; Mechem, Agency, § 54; 22 Cyc. 583; and *Jones v. Valentines' School,* 122 Wis. 318, 99 N. W. 1043, are relied upon. But these authorities go to the extent of holding that the contract will be enforced only to the extent of the benefits received by the infant, and that a voidable contract may be ratified by the infant after becoming of age. They are merely in line with the general rule, and do not hold or intimate that an infant can be held for a tort committed by one acting for him.

Patterson v. Lippincott, supra, is to the effect that a contract for the infant's benefit is voidable, and may be ratified after becoming of age, and that the defense of infancy is a personal privilege. *Jones v. Valentines' School, supra,* holds

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that an infant is bound by implied contract to pay reasonably for necessaries furnished him, but is not liable upon executory contracts to furnish them, nor upon express contract, but that such an executory contract is voidable and not absolutely void, and when repudiated by the infant he must, so far as he reasonably can, make or offer to make restitution. But it has been held that the contract of an infant may be avoided by him without making restitution where restitution is impossible. 22 Cyc. 613. It has also been held that the avoidance of a voidable contract by a minor makes the contract void *ab initio,* as though no contract had ever existed. *Vent v. Osgood,* 19 Pick. 572; *Rice v. Boyer,* 108 Ind. 472, 9 N. E. 420; *Mustard v. Wohlford's Heirs,* 15 Gratt. 329.

In 22 Cyc. at page 514 the general rule is stated that an infant cannot appoint an agent and that such act is absolutely void, but it is said that such act may be voidable, and the case of appointment of an agent to sell a note is cited, where it is held that the infant may, on coming of age, ratify or disaffirm the act. At page 593 the general rule is stated that contracts of infants may be voidable, subject to being disaffirmed or affirmed at majority. The theory of voidable contracts of infants is that they may be sustained for the advantage of the minor, but that they cannot be enforced during infancy if not beneficial to the infant, and if beneficial they can be enforced only to the extent that they are beneficial. And so jealous is the law of the rights of infants, that where a tort is committed by an infant growing out of a contract the infant is not liable if the basis of the cause of action be contract. 22 Cyc. 621; *Lowery v. Cate,* 108 Tenn. 54, 64 S. W. 1068; *Schenk v. Strong,* 4 N. J. Law, 87; *Prescott v. Norris,* 32 N. H. 101; *Sikes v. Johnson,* 16 Mass. 389; *Collins v. Gifford,* 203 N. Y. 465, 96 N. E. 721.

Counsel for respondent cites us to Labatt on Master and Servant, where the idea is advanced that an infant ought to

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be held liable for the acts of his servant in the course of his employment. Vol. 1 (2d ed.), p. 379. The learned author, however, cites no authority to support the position and admits that there is a singular dearth of judicial authority respecting the points. He does not attempt to meet the elementary doctrine that the relation of master and servant does not exist between an infant and his servant. Nor does he refer to the universal doctrine that infants can be held on voidable contracts only to the extent of the benefits received. All we have is the statement of the learned author, which indeed, standing alone, is entitled to great respect, but we do not feel that it can outweigh principle and authority against it. Mr. Labatt, however, frankly admits the authorities are not with him and does not take a decided position, but suggests an argument on the point.

The cases cited by counsel for respondent where the personal tort of the infant was the basis of the cause of action rest upon a different principle. Infants are, of course, liable for their personal torts, but here, upon the allegations of the complaint, the cause of action rests upon the doctrine of *respondeat superior,* therefore the complaint states no cause of action.

By the Court.—The order appealed from is reversed, and the cause remanded with instructions to sustain the demurrer, and for further proceedings according to law.

SIEBECKER, J., took no part.

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STATE EX REL. CITY OF MILWAUKEE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 19—May 1, 1914.

Street railways: Franchise ordinance: Construction: Contractual provisions: Municipal power of regulation: Duty to keep railway zone in repair: Paving and repaving: Mandamus: *Sufficiency of return.*

1. In case of doubt as to the nature of a provision imposing a duty upon a street railway company under a franchise ordinance enacted pursuant to sec. 1862, Stats., it is to be construed as a regulation rather than a contract.
2. Sec. 1862, Stats., authorizing a city to grant the use of the streets for street railway purposes, and providing that "every such road shall . . . be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe," affects the construction of an ordinance enacted pursuant thereto to the same extent as if it were expressly written into the ordinance.
3. In regulating the repair and improvement of its streets a city exercises a legislative function, and it cannot, without express authority from the legislature to do so, contract away its legislative power.
4. The specification in a franchise ordinance of the portion of the street which must be kept in repair by a street railway company may, perhaps, be the subject of contract, but a provision designating the kind of repair cannot be. The former relates to a matter in which permanence and unchanging policy are permissible; the latter to an exercise of legislative power in a matter which is necessarily subject to change from time to time.
5. Practical construction by the city of a provision in the franchise ordinance regulating the mode of repair does not preclude it from prescribing new regulations by ordinance.
6. The obligation imposed by a street railway franchise to keep a described portion of the street in good repair carries with it the duty to pave such portion when, having regard to the paving upon contiguous portions of the same street, paving is reasonably necessary to constitute good repair.
7. A specification in such franchise of the use of certain kinds of paving materials for keeping the prescribed zone in repair necessarily implies repair by paving.
8. A provision in such franchise that the street railway company

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shall keep in repair prescribed spaces between and beside the rails "with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs," is not contractual but is subject to the paramount provision that the company must keep the street in good repair and to the continuing power of regulation contained in sec. 1862, Stats.

9. The words "same material" in such provision do not mean the identical blocks, brick, or asphalt, but the same kind of material, *i. e.* the same style of pavement.

10. Where a street, originally paved by the city from curb to curb with one style of pavement, has been repaved, outside of the railway zone, with a different style of pavement, the right of the street railway company to use the old style of pavement in making repairs depends upon whether by such use the zone in question is or can be kept in good repair.

11. The city ordinarily has the right to determine, within reasonable limits, what constitutes good repair; and it cannot deprive itself of that power.

12. Where it is sought to compel a street railway company to repair the railway zone by repaving it with a new style of pavement, which has been laid by the city on the rest of the street, the common council, in the exercise of the power of regulation conferred by sec. 1862, Stats., should by ordinance (or perhaps by a resolution legally equivalent to an ordinance) prescribe the duty of the company in that respect.

13. In a proceeding by *mandamus* to compel such repaving, if the relation does not plead any lawful change in the provision of the original franchise ordinance above quoted, a return averring the company's readiness to put the zone in question in good repair with the materials last used by the city to pave the same, as required by that provision, states a good defense, it being presumed in support thereof that it is possible in that manner to create a condition of good repair.

WINSLOW, C. J., BARNES, J., and VINJE, J., dissent.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to a return to an alternative writ of *mandamus.*

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* assistant city attorney, and oral argument by *Mr. Williams.*

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For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack.*

TIMLIN, J. The relation for the alternative writ averred that Lisbon avenue had been paved with a cedar block pavement resting upon planks laid on a sand foundation prior to its occupation by respondent railway. This cedar block pavement extended from curb to curb and the full length of that portion of Lisbon avenue in question. Recently the city of *Milwaukee* paved the portion of Lisbon avenue between Twenty-fourth and Twenty-seventh streets and between the curb and a line one foot from the rail nearest to such curb with asphalt pavement upon a concrete foundation. The former wooden block pavement in the street between the railway tracks and one foot on either side of the outside rail is worn, dilapidated, and in such a condition that the street is unsafe. No ordinance or other action of the common council or other city authority, except the original franchise ordinance issued to the respondent pursuant to sec. 1862, Stats., is expressly averred. Sec. 2 of that ordinance provides:

"The track of the said railway shall be of the gauge of not more nor less than four feet eight and one-half inches, and shall not be elevated above nor depressed below the established grade of the street. It shall be laid with modern improved rails, as approved by the board of public works, and in such manner that carriages and other vehicles can easily and freely cross said streets at any and all points and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable. It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and board of public works of said city shall agree upon some other material and said company shall then use the material agreed upon."

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The appellant seeks to compel the respondent to keep in good repair by paving the street between its rails and for one foot on the outside of each rail as laid and the space between the two inside rails of its double tracks with asphalt pavement upon a concrete foundation. The respondent by way of return to the alternative writ avers, among other things, "that at all times since its tracks were laid in said portion of said street it has kept, and is ready and willing to continue to keep, the roadway in the portion thereof described in paragraph 4 hereof in good repair with the materials last used by said city to pave the same, or with such materials as said city may at any time use to pave or repave the same, as in and by said ordinance required."

The recent cases of *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 151 Wis. 520, 139 N. W. 396, with authorities cited and approved therein, and *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492, with authorities cited and approved therein, leave little room for discussion. The case first above referred to affects the quoted section of the ordinance in detail and will be hereinafter noticed in that way. The case last above cited affects fundamentally the whole theory of interpretation upon which respondent's argument is based. For, if we follow the case last referred to, we approach this section of the ordinance, so far as the same relates to the manner of repair, as a regulation, while if we follow the respondent's argument we approach this whole section of the ordinance as a contract. Sec. 1862, Stats., under and pursuant to which the ordinance in question was enacted, provides, among other things, that any municipal corporation may grant to any corporation there described the use, upon such terms as the proper authorities shall determine, of any streets, etc., for street railway purposes. This is followed by the provision that "every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations . . . as the proper municipal authori-

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ties may by ordinance, from time to time, prescribe." In case of doubt on this point the ordinance is to be construed as a regulation rather than a contract. *East Hartford v. Hartford B. Co.* 10 How. 511; *Goszler v. Georgetown,* 6 Wheat. 593, and cases in Rose's Notes; also *State ex rel. Ginn v. Wilson,* 121 Wis. 523, 99 N. W. 336, and cases there cited and followed.

But upon the point whether the provisions of the ordinance relating to the manner of repair are regulatory or contractual this case is not even doubtful. Similar provisions have already been construed to be merely regulatory in *Madison v. Southern Wis. R. Co., supra.* In *Freeport W. Co. v. Freeport,* 180 U. S. 587, 21 Sup. Ct. 493, the statute under consideration (Public Laws Ill. 1871, p. 259) conferred on the city council power to provide for a supply of water and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not exceeding thirty years. Here the words "fixed by ordinance" were found, but not the words "from time to time." Our statute omits the word "fixed," expressly refers to rules and regulations to which the corporation shall be subject, and provides that these rules and regulations be made by ordinance and from time to time. This presents a much stronger case against the view that this is a contract stipulation than did the case of *Freeport W. Co. v. Freeport, supra.* Our statute would stand as a statute authorizing regulation in this particular under the dissenting as well as under the prevailing opinion in the case last referred to. See, also, *Danville W. Co. v. Danville,* 180 U. S. 619, 21 Sup. Ct. 505, and *Mead v. Portland,* 200 U. S. 148, 26 Sup. Ct. 171.

This sec. 1862 affects the construction of the ordinance in question to the same extent as if it were expressly written into that ordinance. *Manistee I. W. Co. v. Shores L. Co.* 92 Wis. 21, 65 N. W. 863. And it is "as broad and compre-

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hensive as language can make it." *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 144 Wis. 386, 397, 129 N. W. 623. It is not easy to see how this power of regulation could be in force with reference to sprinkling this zone, which sprinkling is not mentioned in the ordinance of 1900, and yet not in force with reference to the manner of repair of the zone, unless indeed we regard the method of repair first specified as an unalterable contract stipulation.

It is further well settled that in regulating the repair and improvement of streets the city is exercising a legislative function, and in performing such work a governmental duty is exercised by the city. Cases *supra* and *Bruhnke v. La Crosse,* 155 Wis. 485, 144 N. W. 1100, and cases cited; 1 Elliott, Roads & S. (3d ed.) § 619. A city cannot, without express authority from the legislature to do so, contract away its legislative power (cases *supra*), but here it appears that the state has given no such authority to the city and the city has not attempted to do so. The specification of that portion of the street which must be kept in good repair by the railway company is not a provision of the same nature as that which designates the kind of repair. The former relates to a matter in which permanence and unchanging policy are permissible, the latter to a matter in which change is at times indispensable and is always to be expected. The former relates to the division of burden between the city and the street railway company, and the latter relates to an exercise of legislative power by the city which cannot be exercised once for all time. The former might be the subject of contract, although that is not necessary to be decided here; the latter could not be the subject of contract unless the city should forego its legislative power of regulation or its continuing duty to regulate.

Another result following this view of the provisions of the ordinance in question relative to the mode of repair is that the question of practical construction urged by respondent's

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counsel disappears. If this is a mere regulation, and if the city is authorized to regulate this mode of repair from time to time, and it requires a particular mode of repair in the instant case, it matters not how long or how often heretofore it neglected to designate or enforce repairs of this particular kind. Both *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 151 Wis. 520, 139 N. W. 396, and *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492, with the authorities therein followed and approved, are authority for the saying that an obligation to keep a described portion of the street in good repair carries with it the duty to pave such portion when, having regard to the paving upon contiguous portions of the same street, paving is reasonably necessary to constitute good repair; or, in other words, when the paved street could not fairly be said to be in good repair unless such portion were also paved. Unless we are prepared to undo what has been done and to gainsay what has been said in the case first cited, we must start with the proposition that the obligation to keep in good repair ordinarily includes the duty to pave as well as to repave whenever necessary to satisfy the requirement of "good repair" found in the franchise ordinance, and, following the case second above cited, we might start with the proposition that the portion of sec. 2 of the ordinance in question contains not contractual stipulations but regulations by the city, made by it under the authority of sec. 1862, Stats., which may from time to time be altered by ordinance. The cases cited recognize that authorities may be found to the contrary of both these propositions, but select and follow those cases and rules which tend to uphold these propositions. Comparing the quoted sec. 2 of the ordinance of 1900 with sec. 4 of the ordinance of 1887, construed in *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., supra,* it seems apparent that they are substantially alike except as to the materials with which repair of the like zone should be made; and except that the latter does not mention paving,

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while the former does, as will appear hereafter. In the latter the zone in question is to be kept and maintained in good and thorough repair by use of the same material as that of which the street shall be composed at the time when such repairs shall be necessary. In the former the like zone is to be at all times kept in good repair with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless, etc. If the latter ordinance required the street railway to repair by paving, then the former section, *a fortiori*, so requires. For it mentions the use of paving material for repair, and it is idle to suppose that paving material should, in repair of streets, be used for any other purpose than for paving. Is this designation of the kind of paving material contractual and controlling? We shall come to that later.

When we compare this franchise ordinance of 1900 with the franchise ordinance of 1892 construed in *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492, we will find that sec. 2 of the latter provided:

"And the said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense. It shall be the duty of said company to repair any and all damage done to the streets, macadamized curbs, cross or sidewalks, gutters or other public or private property by the construction or repairing of the tracks along the streets as herein provided for."

It may be noticed if these words were merely contractual this ordinance would be much stronger against compelling the street railway to pave the zone in question than is the *Milwaukee* ordinance of 1900. The Madison ordinance of 1892 was granted (sec. 1) "subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time

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to time enact." Specific powers of regulation were then expressly reserved in the matter of imposing a license fee, but not in the matter of regulating repair or paving of the belt or zone in question. The *Milwaukee* ordinance of 1900 (sec. 3) contained the following:

"All rights reserved or secured to the said city by and under . . . the laws of Wisconsin relating to . . . the use and operation of all . . . tracks and [relating to?] everything connected with the exercise of the rights hereby or heretofore granted to said railway company . . . are hereby reserved to the city the same as though this ordinance had not been passed and the same [laws?] shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided."

We do not consider it necessary that the statute laws of the state be expressly referred to in the ordinance in order to incorporate them therein. We wish here merely to show that the provisions of the *Milwaukee* 1900 franchise are in this respect the substantial equivalent of the Madison 1892 franchise. In the ordinance of 1900 in question here there is nothing to be found expressly providing that the laws of Wisconsin relating to everything connected with the exercise of the rights thereby granted shall not be applicable. On the contrary there is much to show that such laws are applicable. That the duty to keep in repair includes the duty to pave the zone in question is emphasized by the words, "with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs." Here is an express recognition that the duty to keep in good repair includes the duty to pave. The railway company is to keep the described belt or zone in good repair with the same materials as the city shall have last used to pave or repave. We cannot think that the railway company is required to use paving material for other than paving purposes. To keep in repair by the use of paving material is to pave. It is therefore very clear that under sec. 2 of the ordinance in question the duty

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to keep in repair is a continuing duty and includes paving, and therefore also repaving, whenever such pavement or repavement become reasonably necessary as stated to keep the street in good repair. It is also quite obvious that the words "same material" do not mean the identical blocks, brick, or asphalt, however worn out or rotten, but mean the same kind of material, that is to say, the same style of pavement. The defendant also expressly recognizes its duty to repave under the ordinance and offers to pave with the same material formerly used by the city upon the street and the zone in question.

A somewhat different but cognate question arises upon the requirement that such repair shall be made with the same paving material as the city shall have last used to pave or repave *the zone described and the street previous to such repairs.* When we consider that the duty to keep this zone in good repair is positive and absolute, and that the words following merely regulate the mode of performance of this duty, we perceive how irrational it would be to hold that the duty to keep in good repair is inferior and subordinate to the requirement concerning the kind of repair to be made in a given case. *Doyle v. New York,* 58 App. Div. 588, 69 N. Y. Supp. 120. This given case is that of a street which was formerly paved by the city from curb to curb.

Let us first apply the ordinance to the case of a street paved at the time of the enactment and acceptance of the ordinance as most surely within its scope. That is the instant case. Under the literal terms of this provision the railway company would have the right, whenever repairs which involved paving or repaving become necessary, to use the old style of pavement for that purpose. If there had been no change in the kind of pavement used no difficulty would exist. But where a change of the kind or style of pavement was made the railway company might insist upon the old style of pavement for the first repair following the

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change. When by lapse of time and wear and tear the next repair of the zone in question is due from the railway company, how shall it be made? With the same material first used by the city or with the changed material second used? In the case instanced it will be observed that the first used material was used by the city to pave the street and zone in question, and in the second instance the city did not pave both the street and the zone in question, but the zone in question was repaved by the railway company with the old style of pavement. The literal terms of the ordinance would therefore permit the railway company to go on forever using a pavement of the original or first kind. But this right of the railway company to make repairs by using the original style of pavement is subject to the paramount provision that it keep the street in good repair and the continuing power of regulation contained in sec. 1862, *supra*. When we come to a case where the street could not be kept in good repair by the continued use of the first or original style of pavement, the right to use such must, by force of sec. 1862, *supra*, yield to the duty to keep the street in good repair, even in a case where the street was paved when the ordinance was enacted and accepted. It cannot be held that the city has bartered away its governmental power to order the whole street paved in such manner and with such material as public interest requires. The provisions of this ordinance must be reconciled. This can only be done by allowing the railway company to use the original style of pavement in all cases where such use is consistent with good repair; that is, where after such use the street, notwithstanding a different pavement is used upon the remainder thereof, is, with the zone in question paved in the old style, still in good repair.

The words of the ordinance are that the railway company "shall . . . at all times . . . keep" the zone in question "in good repair . . . with the same material," etc. Where the street cannot be kept in good repair with the same material

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the railway company has failed in its duty. It is not permissible to interpret the words "keep in good repair" as excluding the duty to pave, where without such pavement the street would not be in good repair. This is so if we are to follow the decisions already made and above referred to, and for the further reason that the ordinance expressly makes good repair to include paving and repaving with certain described materials. The real position of respondent upon this point amounts to saying that the railway company can only be required to pave with the material formerly used by the city, and that it may stand upon this right and so compel the city to do the paving of the zone in question at its own expense or at the expense of the abutting property owners if the city desires or requires any different kind of pavement from that first used. This is a sort of "holdup," proper enough if one stands out upon an absolute legal right of his and refuses to surrender it except for some concession by the other side. If, however, the railway company is bound to keep the zone in question in good repair, with the old kind of pavement if possible, but in good repair anyway, this right to use the old style of pavement will be found to turn upon whether by such use the zone in question is or can be kept in good repair. The city ordinarily has the right to determine within reasonable limits what constitutes good repair, and has not deprived itself of the power, nor can it do so if the provisions of sec. 1862, *supra,* are to prevail, according to the latest decision of this court. Notwithstanding the duty cast upon the railway company to keep this zone in good repair with the old style of pavement if possible, but in good repair anyway, there may be many instances in which the paving will still be done by the city, as, for example, where the railway company is not ordered to do so, where a mutual agreement is arrived at between the railway company and the board of public works that the city shall pave in the instance concerned, or where the railway company refuses to repair or neglects to do so and the city, instead of

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proceeding by *mandamus* as in this case and subjecting itself to the delays of litigation, does the work at once and charges the expenses up to the railway company. These are the matters apparently covered and provided for by sec. 9 of the ordinance. From this analysis of the terms of the ordinance we think it appears that provisions therein relating to the kind of pavement to be used are not contractual, but are subject to the regulation from time to time mentioned in sec. 1862, *supra*.

It appears from the relation as stated that the former pavement was a cedar block pavement upon a plank base resting upon a sand foundation, which is now worn out, dilapidated, and dangerous, and that outside of the zone in question the city has paved the street with an asphalt pavement resting upon a concrete foundation. It is also averred in the relation that to pave the zone in question with such cedar block pavement would not properly safeguard persons using the street or property. We think this is equivalent to an averment that the street would not be left in good repair, but such want of good repair ought to be expressly stated. The return admits most of the material averments of the relation, but takes issue upon the interpretation of the ordinance, and asserts the right to continue the cedar block pavement. It is not contended by counsel for respondent either in his brief or argument, as we understand him, that the city in 1900, when the franchise ordinance in question was enacted and accepted, had determined that for all future time during the life of the ordinance the mere use by the railway company of the former style of pavement would always constitute good repair. Counsel for respondent, however, does insist that the railway company has performed its duty of keeping the zone in question in good repair whenever it has by the use of the former materials produced a condition of good repair in the said zone, whether this repair is satisfactory to the city or not. He thus apparently rests upon what he considers a contract right. But it was said in *Madison v. Southern Wis.*

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R. Co. 156 Wis. 352, 146 N. W. 492, with respect to a similar provision for repairs:

"The idea of the lawmakers is that the broad power is not subject to exhaustion or limitation by any specific requirement in the grant. Note the words, 'from time to time,' showing the legislative idea was that changed conditions, within the life of such a franchise, will be quite likely to require physical and other changes in the manner of using the streets which could not be foreseen and particularly provided for in advance."

It was also said in the case last mentioned with reference to and in explanation of *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487, as follows:

"The spirit of the decision is that such statute [sec. 1862, Stats.] is a part of such a franchise and contemplates that the municipality shall have the broad continuing power of regulation, enabling it to deal with conditions as they may exist from time to time." See, also, *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 1136, 1139.

Sec. 1862, Stats., provides that every street railway shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations as the proper municipal authorities may by ordinance, from time to time, prescribe. No ordinance qualifying or modifying the terms of the original ordinance of 1900 with reference to the duty of the street railway company to pave between its tracks is pleaded and we assume that none was enacted. The correct practice would have been for the common council by ordinance to prescribe the duty of the street railway company to keep this zone in repair by constructing therein an asphalt pavement upon a concrete foundation to correspond with the remainder of the street, and so comply with sec. 1862, Stats. It appears without controversy that the city has completed upon the remaining portions of the street an asphalt pavement on a concrete foundation. Before doing this the common council must, either upon petition of the abutters or by the votes of three fourths of the aldermen elected and a ma-

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jority of the aldermen of the ward or wards in which such paving was done, have adopted a resolution ordering this paving of the street. Sec. 6, ch. VII, City Charter. Although this might be somewhat irregular, and the duty should under sec. 1862 have been imposed upon the railway company by ordinance, still a resolution might operate as an ordinance in the particular case, and it may afford a sufficient basis for the maintenance of this action and one which the respondent could defeat, if at all, only by showing the absence of any lawful or proper ordinance or equivalent resolution requiring pavement of the zone in question to correspond with other pavement on the adjoining portions of the street, and the fact that the zone in question as it proposes to repair it will, relatively to the remainder of the street, be in a condition of good repair. If the city is unable to show that any lawful change was made in the ordinance of 1900, the return of respondent averring its readiness to put the zone in question in good repair as required by that ordinance states a good defense, because we may assume in support of the pleading that it is in that manner possible to create a condition of good repair. Instead of demurring to such return the relator should by replication have averred the impossibility of good repair in the manner proposed by respondent and that the ordinance of 1900 was, after its enactment, amended or modified by an ordinance or resolution legally equivalent to an ordinance requiring the respondent to pave the zone in question with the same material as is used upon the remainder of the street. It is not intended to conclude the respondent upon the question of whether a resolution may be, in any case under the circumstances existing here, equivalent to an ordinance. We have had no argument upon that point.

It follows that the order should be affirmed, and the cause remanded for further proceedings according to law upon the merits of the controversy.

By the Court.—Order affirmed, and cause remanded for further proceedings according to law.

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WINSLOW, C. J. I am unable to agree with the reasoning of the court in these cases, and I wish to state briefly the grounds of my dissent without attempting extended argument.

As I read the ordinance, it requires the company to repair but does not require it to repave, although the subject of repaving was in mind. Sec. 2 of the ordinance provides as follows:

"It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon."

Sec. 9 of the ordinance provides specifically and carefully what the duties of the street railway company are in case the city at any time determines to pave "or repave" the street. It reads as follows:

"Whenever the said city shall determine to pave or repave any street upon which street-car tracks are or shall be situate, the board of public works shall give notice thereof to said railway company, and thereupon said railway company shall immediately make all such repairs, connections, conduits and improvements as it shall then deem necessary for the use and operation of its tracks and railway; after any such street shall be paved by said city, the pavements thereon and the pavements upon any and all streets heretofore paved by said city shall not be opened or disturbed by said railway company for any purpose whatsoever, except by permission in writing therefor signed by the mayor and the members of the said board of public works. And whenever any such permit shall be given the city engineer shall promptly give plans and specifications for opening and closing the pavement, and said railway company shall do such work according to such plans and specifications and under the super-

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vision of said board of public works and city engineer and to their satisfaction, and said board shall have power to employ necessary and competent inspector or inspectors to actively superintend the work, and his compensation shall be paid by said railway company; and if said railway company shall fail or neglect or refuse to properly replace or repair any pavement so opened the city shall have the right to replace or repair the same by and under the direction of said board of public works, and said railway company shall pay the actual cost and expense thereof."

The two sections taken together seem to me to be clear. It is certain that "repairing," "paving," and "repaving" were all in mind. Paving and repaving are expressly provided for and are to be done *by the city*. Before either is done the railway company is to make all repairs, connections, conduits, and improvements required for the operation of the railway in order to obviate as far as possible the necessity of opening up of the pavement in the future, but if such necessity arises the opening and closing of the pavement is to be done by the company at its own expense under supervision of city officials. The company is "at all times to keep in good repair the roadway between the rails and for one foot outside of each rail . . . with the same material as the city shall have last used to pave or repave *these spaces* and the street previous to such repairs," unless a different material is agreed upon.

The scheme seems perfectly simple and the provisions for carrying it out unambiguous. The *city* is to do all paving and repaving, the *company* is to prepare all its necessary conduits and connections before the city does the paving or repaving, and is to keep the pavement which the city has put down in these spaces, *i. e.*, the railway zone, "at all times in good repair," with the same material unless some other material is agreed upon. Language could hardly be plainer as it seems to me. The difference between the provisions of this ordinance and the provisions of the ordinances involved

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in the recent cases of *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 151 Wis. 520, 139 N. W. 396, and *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492, is to my mind very marked.

The logical result of this decision, as it seems to me, is that no contract with regard to paving can be entered into between the city and the railway company under the terms of sec. 1862, Stats., which the city may not abrogate at any time by passing an ordinance to that effect.

I find nothing in sec. 1862 which justifies this conclusion, and it seems to me that it is contrary to the universal current of authority. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925, and cases cited in the opinion. That section provides that cities may grant to street railway corporations the right to construct and operate street railways "upon such terms" as the proper authorities may determine. This provision is entirely separate and independent of the later provision in the section to the effect that every such road shall be subject to such "rules and regulations" as the municipal authorities may from time to time provide. It is very plain to me that the provisions of the ordinance in question prescribing which party shall do paving and which party repairing are "terms" within the meaning of sec. 1862, and it is equally plain to me that the "reasonable rules and regulations" which the city is authorized to impose from time to time afterwards are simply police regulations not inconsistent with the "terms" originally imposed. Otherwise it would seem that the city might at any time require the street-car company to pave the whole street and justify its action as an exercise of the reserve power to impose "reasonable rules and regulations."

BARNES, J., and VINJE, J. We concur in the foregoing dissenting opinion of the Chief Justice.

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STATE EX REL. CITY OF MILWAUKEE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 19—May 1, 1914.

Street railways: Regulation: Paving of railway zone.

State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., ante, p. 121, followed in a case in which the railway zone had never been paved, it being *held* that when the city had paved the remainder of the street and the railway zone was not in good repair the street railway company might be compelled to pave its zone with a pavement of the same kind as that used by the city.

WINSLOW, C. J., BARNES, J., and VINJE, J., dissent.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the respondent's return to an alternative writ of *mandamus.*

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack.*

TIMLIN, J. This case is in all respects like the preceding case of the same title, except that this relates to Folsom street, which was, when the street railway tracks were laid therein and up to September, 1913, a street which was from curb to curb composed of a combination of earth, crushed stone, and gravel. About the date last mentioned the city paved with sandstone pavement upon a concrete foundation the street in question, except the zone required by the franchise ordinance of 1900 to be kept in good repair by the railway company. This zone consists of a strip in the middle of the street between the rails and for one foot on the outside of each rail as laid and the space between the two inside rails of the

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double tracks of the respondent. By this action it is sought to compel the respondent to pave this zone with the like pavement as is now upon the remainder of the street, and the basis for such compulsion is the fact of the construction by the city of a sandstone pavement on a concrete foundation as stated, and an averment that the said zone is not in good repair and in a very uneven, rough, and dilapidated condition, and has no paving whatever therein, but the surface thereof consists of dirt and some sand and gravel, which during wet or rainy weather becomes soft and muddy, and during dry weather rough, uneven, and dusty, and at all times dangerous, etc. The respondent avers, among other things, that it has the zone in good repair and is ready and willing to continue to keep the zone in question in good repair with such material as the city may at any time use to pave or repave the zone in question, and that it refuses to pave with sandstone pavement upon a concrete foundation. Under the view taken in the companion case of the effect of sec. 1862, Stats., following *Madison v. Southern Wis. R. Co.* 156 Wis. 352, 146 N. W. 492, there is no substantial distinction to be found in the fact that in the companion case the street was paved with a cedar block pavement at the time the ordinance was enacted.

The case is governed by the decision in the companion case of the same title, and the order overruling the demurrer should be affirmed for the reasons therein given.

By the Court.—Order affirmed, and the cause remanded for further proceedings according to law.

WINSLOW, C. J., BARNES, J., and VINJE, J., dissent.

[For opinion, see preceding case.]

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GOLDSTINE and others, Respondents, vs. TOLMAN and others, Appellants.

March 19—May 1, 1914.

Contracts: Requisites: Meeting of minds: Preliminary agreements: Incompleteness: Practical construction by parties: Agreement to lease: Specific performance: Breach by both parties.

1. Where a contract informal but complete in its terms appears to have been made, it will take effect although the parties contemplate that a more formal one will thereafter be made; but writings intended only as preliminary negotiations, to be followed by a formal contract containing material provisions not contained in or to be inferred from such preliminary writings, will not take effect as a contract.
2. By a "preliminary agreement" the owner of a city lot agreed to lease it to plaintiffs for ninety-nine years "on the usual terms as applied to a ninety-nine year lease," and plaintiffs were to erect a building thereon. Payment of $250 by the plaintiffs was recited "for the payment of attorneys' fees, providing this lease is not merged into an actual agreement and new lease. If it is, they are to have credit for $250." Said agreement, with a supplemental agreement, definitely settled some of the main provisions of the lease thereafter to be executed, such as the term, the rental to be paid, the cost of the new building, the time when it was to be completed, the ownership of it at the end of the term, and the sum to be advanced by the lessor in aid of its construction, but as to many other important matters (some of which were referred to in said agreements) made only the general provision above quoted. It appears that there was no general or usual form for a ninety-nine year lease in use in the city where the property was located. After the execution of such preliminary agreements, the parties disagreed as to various matters left indefinite therein, and each in turn submitted two successive leases embodying his own ideas thereof, differing, however, in their terms and containing also modifications of some of the definite provisions of the agreements. At the end of about six months they were unable to harmonize the points of difference and negotiations practically ceased. *Held*, that said agreements were tentative only, and that there was no definite contract upon the terms of which the minds of the parties had fully met or of which specific performance could be enforced.

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3. In an action for specific performance, brought more than a year and a half after negotiations had ceased and after the defendant owner had spent large sums on repairs and had given a ninety-nine year lease to another person, the trial court held that plaintiffs were entitled to specific performance of the preliminary agreements, and prepared a lease which it held to be in conformity therewith. Such lease differed materially from any of the leases drawn by the parties and submitted to each other as above stated. *Held* that, even assuming that the minds of the parties had in fact met on the terms of the lease prepared by the court, plaintiffs were not entitled to relief, because their failure during the negotiations to state with substantial accuracy the terms of such lease was as much a breach of their obligation as was the owner's like failure a breach of his obligation.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This action was brought to enforce specific performance of an alleged agreement to enter into a ninety-nine year lease, and resulted in a judgment for the plaintiffs. On October 16, 1909, the plaintiffs and the defendant *S. A. Tolman* entered into the following agreement:

"This preliminary agreement certifies that *S. A. Tolman,* party of the first part, and *James A. Silver, Max Goldstine* and *Gustave E. Kahn,* parties of the second part; that party of the first part agrees to lease the property south of the alley facing on Third and Sycamore streets in Milwaukee, Wis., owned by first party, to parties of the second part for ninety-nine years on the usual terms as applied to a ninety-nine year lease, leasing the property for the first fifteen years at $22,500 per year, balance of eighty-four years at $23,500 per year, payable monthly in advance, first party agreeing to rebate the first year during building, $5,000 from the rental parties of the second part are to pay as here specified. Parties of the second part agree to put up a fire-proof building which shall be put up with foundations sufficient to carry ten or more story building and walls to carry that height also, and party of the second part shall give good and sufficient security that they will put up a building to cost not less than $200,000 and any more money required to complete the

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building they are to furnish. Party of the first part agrees to loan party of the second part $100,000 for five years at five per cent. per annum. After five years second parties to have option to have loan continued and pay $10,000 on the principal annually until it is paid. Interest on money loaned by said first party payable monthly in advance. Parties of the second part are to have plans and specifications drawn and submit same to the party of the first part for his approval, and no building shall be put up without his approval and he puts in this $100,000 after party of the second part have put in theirs and he as fast as architect's certificates and mechanic's liens are furnished. Parties of the second part shall have the right to purchase the property any time within ten years at $550,000. Parties of the second part shall insure the property at least eighty per cent. of the value of the buildings and in case of fire the same shall be paid to the first party as his interest may appear, and this insurance on the property shall continue to his benefit during the life of the lease, and at the end of the lease term, buildings shall go free to the party owning the fee simple. Party of the second part hereby pays $250 for the payment of attorneys' fees, providing this lease is not merged into an actual agreement and new lease. If it is, they are to have credit for $250. Date of this lease to take effect on the 1st of January, 1910. Parties of the second part having all signed this agreement and are to continue to be responsible to party of the first part for the lease up to the time of full payment of money advanced for the building. Parties of the second part have the right to form a holding company with sufficient responsibility to carry on and make them responsible for the rental of the property and carry out this preliminary agreement; parties of the second part personally signing the notes and lease and being personally responsible to the end of the time when the payment is fully made for money loaned by party of the first part. Lease must be completed and signed not later than November 5, 1909."

On October 20, 1909, the following supplementary agreement was made:

"This agreement, made between *S. A. Tolman* of the city of Chicago, Cook county, Illinois, party of the first part, and

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James A. Silver, Max Goldstine and *Gustave E. Kahn,* parties of the second part, and as supplemental to the preliminary agreement entered into by said parties on the 16th day of October, 1909, and as though fully incorporated therein.

"The said *S. A. Tolman* agrees to and with the parties of the second part that the said long-term lease shall contain a provision that in case of default of the lessees under said lease, lessees shall be entitled to thirty days' notice.

"And the said parties of the second part agree to furnish a good and sufficient bond acceptable to party of the first part, equivalent to the moneys actually required and to be put in said building in the erection thereof by the parties of the second part.

"And the said first party further agrees to pay the taxes and all assessments for the year 1909.

"And it is mutually agreed between the parties hereto that the building on the said premises to be erected shall be of the construction known as reinforced concrete and acceptable to party of the first part.

"And the parties of the second part agree to pay all taxes, insurance premiums and charges of every nature which may accrue after January 1, 1910, it being agreed and understood by and between the parties hereto that the rentals provided shall be net to said party of the first part without discount or deduction, excepting, however, the $5,000 which shall be rebated the first year during the erection of the building.

"Said party of the first part agrees that in addition to the property described in the agreement of October 16th, he agrees to lease to the parties of the second part whatever rights he may have in the alley north of the said premises belonging to and attaching to the said premises south of the alley.

"Said parties of the second part agree, on January 1, 1910, to accept the leases now on and affecting the said premises."

In pursuance of these agreements the defendant *S. A. Tolman* tendered a form of lease to the plaintiffs under date of October 28, 1909. The lease tendered was not satisfactory, and on November 5th the plaintiffs prepared and tendered to *Tolman* a lease which they claimed conformed to the agree-

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ment of the parties. This lease was accompanied by a form of bond. This form of lease was not satisfactory to *Tolman* and he refused to execute it. Thereafter considerable negotiations were carried on, personally and by correspondence, in an endeavor to agree upon the terms of the lease. On or about February 28, 1910, *Tolman* prepared and submitted a second lease which modified to some extent the terms of the one first presented, and offered to execute the same. This lease was not satisfactory to the plaintiffs and they in turn prepared and on April 16, 1910, presented to *Tolman* a second lease, modifying to some extent the terms contained in the lease which they first presented, and demanded of *Tolman* that he execute the same. This he refused to do, and the negotiations between the parties practically ceased at this time. The premises covered by these agreements were occupied by seven different tenants when the agreements were made. The leases held by six of them expired on May 1, 1910, and after the negotiations had practically come to an end and on April 15, 1910, *Tolman* proceeded to renew the leases of his tenants. Part of the property covered by the proposed leases consisted of the Davidson Theater and the Hotel Davidson. It was necessary to make repairs on these buildings, and the sum of $26,840 was expended in making such repairs. Some attempt was made by the plaintiffs to renew negotiations during the summer of 1911, but nothing came of it. On October 10, 1911, the defendant *Tolman* leased the same premises to his codefendant *Stone* for a period of ninety-nine years.

In addition to the facts recited, the circuit court found (1) that the expression, "on the usual terms as applied to a ninety-nine year lease," which appeared in the contract of October 16th, was used and intended by the parties to mean those terms which were usually applied to a lease for ninety-nine years in the city of Chicago at that time; (2) that *Tolman* directed his attorneys to draw a lease which, in addition

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to the matters expressly provided for in the two preliminary agreements, should contain the usual terms applied to a lease for ninety-nine years in the city of Chicago; (3) that in the lease so prepared, bearing date October 29th, there are the usual terms as applied to a ninety-nine year lease in said city, but that certain provisions which related to matters expressly agreed upon in the preliminary agreements were not in accordance with the terms of these agreements; (4) that prior to November 5, 1909, plaintiffs did not propose any sufficient sureties or acceptable bond to said *S. A. Tolman* under said preliminary agreements, and that no contract or arrangement had been made with any sureties by the plaintiffs for the signature of the bond form tendered by the plaintiffs on November 5, 1909; (5) that during the months of August and September, 1911, the defendant *Stone* negotiated with the agent of the defendant *Tolman* for a lease of the property; that on or about September 7th the form of the lease was agreed upon and on October 11, 1911, the same was reduced to writing, executed, and delivered; (6) that at the time the defendants began their negotiations and thereafter they believed that whatever rights the plaintiffs had under the preliminary agreements had terminated; (7) that the failure of *Tolman* to execute and deliver to the plaintiffs a lease of the premises in question was not caused by or due to any act of the defendant *Stone;* (8) that the said lease which was entered into between the defendants was made and entered into in good faith and without intent or design to injure, cheat, or defraud the plaintiffs; that there was no conspiracy or agreement between the defendants to cheat or defraud the plaintiffs or any or either of them; (9) that the defendant *Stone* took possession of the premises under said lease as of October 1, 1911, and has since that time been in possession thereof; (10) that plaintiffs at all times since the preliminary agreements were made have been ready, able, and willing to perform the said agreements and to execute a lease of

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the premises conformable with and correctly expressing the terms of said agreements, and that the defendant *Tolman* at all times since the making of said preliminary agreements has refused to enter into a lease conformable with and correctly expressing the terms of said written agreements.

The court also found that there were some provisions in the leases tendered by the plaintiffs on November 5, 1909, and on April 16, 1910, which were not in accordance with some of the terms of the preliminary agreements. The court also found that the same was true of the forms of lease tendered by *Tolman*.

As conclusions of law the court found (1) that it was the duty of the defendant *Tolman* to prepare and tender to the plaintiffs for execution a lease in accordance with the terms of the preliminary contracts, and that he failed to prepare and tender to the plaintiffs such a form of lease; (2) that plaintiff *Goldstine* was entitled to specific performance of the preliminary agreements; (3) that the lease made to *Stone* on October 10, 1911, should be canceled and adjudged to be of no effect.

The only testimony in the case relied on by respondents and bearing on what were the "usual terms of a ninety-nine year lease" was the following: *Mr. Tolman* testified that he presented the matter to his attorney, Mr. Ashcraft, for him to draw a lease in conformity to the preliminary agreement and that he believed his attorney drew such a lease and sent it to Milwaukee. He also said that he requested his attorney to prepare a lease under the usual terms that a ninety-nine year lease is drawn in Chicago and that he believed such a lease was drawn and sent to Milwaukee. The defendants' evidence showed that in 1909 and 1910 there were a great variety of forms of ninety-nine year leases in Milwaukee and that the material portions of such leases were very varied.

The trial court prepared a form of lease which he conceived correctly set forth the agreement upon which the

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minds of the parties met. In preparing such lease he included, or at least endeavored to include, all of the terms and conditions contained in the lease as drawn by *Mr. Tolman's* attorneys, excepting only where he found such terms and conditions to be in conflict with the provisions of the preliminary agreements.

For the appellants *Tolman* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and a separate brief by *E. M. Ashcraft,* of counsel; and the cause was argued orally by *Mr. J. V. Quarles* and *Mr. Ashcraft.*

For the respondents there was a brief by *Harper & McMynn* and *Gilbert J. Davelaar,* and oral argument by *Mr. R. N. McMynn* and *Mr. Davelaar.*

BARNES, J. The plaintiffs in their complaint set forth the preliminary agreements and alleged that on the 5th of November, 1909, they tendered the defendant *Tolman* a lease in full performance of and in compliance with such agreements and demanded execution thereof, and that thereafter considerable correspondence and negotiations took place between the parties, and that again on April 16, 1910, they tendered a second lease in full performance of and in compliance with the terms of said agreements and demanded execution thereof, and that defendant *Tolman* refused and still refuses to execute and deliver the lease which he agreed to enter into, and that plaintiffs fully performed the terms and conditions of the preliminary agreements and were willing to accept a lease of the premises conformable with and correctly expressing the agreement of the parties. The relief demanded was that the contract be specifically enforced and that plaintiffs recover the damages sustained by reason of the delay, which were placed at $351,666.70.

It was stipulated that the action should proceed to trial, reserving proof as to the amount and assessment of damages,

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for a compulsory reference, or trial by the court, if such should prove to be necessary, and that on the trial had the case should proceed to judgment, which judgment should determine all of the issues except the amount and assessment of damages reserved as stated.

The trial court held that the forms of lease submitted by the defendant *Tolman* to the plaintiffs on October 28, 1909, and on February 28, 1910, did not conform to the requirements of the contract for a lease. The court also held that the same was true of the forms of lease which the plaintiffs submitted to *Tolman* under dates of November 5, 1909, and April 16, 1910. The court further held in a decision rendered on the question of costs that the forms submitted by *Tolman* conformed more closely to the lease to which the plaintiffs were entitled than did the forms proposed by the plaintiffs.

The trial court apparently proceeded on the theory that the preliminary agreements constituted a definite contract upon the terms of which the minds of the parties met, and that the first lease submitted by *Tolman* correctly embodied the agreement of the parties, except as to matters wherein it was in conflict with the specific provisions of the two preliminary agreements. The lease prepared by the court was framed on this basis. Evidently the court was also of the opinion that the duty rested upon the defendant *Tolman* to prepare such a lease as it was found that the parties agreed upon, and that, having defaulted in this duty, it was proper for the court to ascertain what the contract in fact was and give relief by way of specific performance.

We are unable to reach the same conclusion as did the trial court as to the effect that should be given to the two preliminary agreements. We do not think they evidenced a contract upon the terms of which the minds of the parties met as to all essential details and covenants, and we think it is very evident that the parties did not so regard those tentative

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agreements. It is obvious that these contracts were entered into in good faith by both parties and with the expectation that a satisfactory lease could be agreed upon. Some of the main provisions were definitely provided for, such as the duration of the lease, the rental to be paid, the amount to be invested in a new building, the time when it was to be completed, the ownership of it at the end of the term, and the amount of money which *Tolman* was to advance to aid in its construction, as well as some other matters. But there were a great many provisions which were not covered by the tentative agreements, except by the very general and what would seem to be indefinite recital that the lease was to be made "on the usual terms as applied to a ninety-nine year lease." These preliminary agreements take up about three pages of the printed case. The lease prepared by the court covers twenty-five pages and contains about twenty covenants that are not mentioned in the writings signed by the parties, except as they are covered by the clause referring to the usual terms contained in ninety-nine year leases. All matters mentioned in the tentative agreements were not definitely settled and provided for therein.

We regard these contracts as amounting to an agreement of the parties on such of the points as were specifically covered and an agreement to agree, if possible, on those which were not. They made a starting point for negotiations and treaty on those matters which were not agreed upon, instead of definitely settling the rights of the parties on all material questions. This conclusion can be quite satisfactorily reached from the provisions of the preliminary agreements. It is also apparent from the construction which the parties themselves placed upon these contracts. Not only was there a disagreement upon the matters which were left indefinite, but both parties endeavored to secure modifications of certain provisions of the agreements which were definite. Such conduct was consistent only with the belief that a lease had not

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been agreed upon and that either party was at liberty to make the best trade he could during the negotiations.

It is clear that the two agreements referred to were not intended to constitute the lease which the parties were to make, because they provided for another one which would specifically cover the mutual obligations to be assumed by the parties. While the same subjects may be quite generally covered by ninety-nine year leases, it would be remarkable if there was a general uniformity in the manner in which they were covered or in the obligations assumed in reference thereto. The proof showed that there was no general uniformity as to such leases in Milwaukee. We are not unmindful of the fact that respondents insist that the matter is fully covered in *Tolman's* evidence. We do not think so, but this point in itself is not of sufficient importance to discuss it at length.

The parties had in contemplation that in an important and complicated transaction of this kind attorneys would be employed to draft the necessary papers, and they were employed by both parties. *Tolman* did not desire to be out any money on this account if the negotiations resulted in nothing, and so required the plaintiffs to pay him $250 to make him whole if the negotiations fell through. If they did not, the amount was to be credited on rent. This provision very clearly indicated that the parties did not understand that the terms of the lease had been agreed upon. It is argued that the money was paid as compensation for drawing a lease, the terms of which had been settled, but the language of the agreement itself and the subsequent conduct of the parties clearly show that such was not the case. If it was, why was the provision made for crediting the amount on rent if an agreement to lease was consummated? Aside from the reference to the usual terms on which ninety-nine year leases are drawn, the preliminary contracts are indefinite in some respects and approach being unenforceable in others. The first one provides

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that plaintiffs shall give sufficient security that they will put up a building to cost not less than $200,000. Nothing is said as to who shall pass upon the sufficiency of the security or as to how it shall be determined. The plans and specifications of the new building were required to be submitted to *Tolman,* and no building could be put up without his approval. If this provision were enforced according to its terms, *Tolman* could prevent the erection of any building. This was one of the clauses on which the parties split during their earlier negotiations. *Tolman* construed the provision last referred to as giving him the absolute right to say what kind of a building should be put up, and in the first lease which he had prepared he specified that it should be a hotel building. Plaintiffs declined to accept this construction as being correct. This agreement required plans and specifications for the building to be submitted to *Tolman* for his approval, in addition to providing that no building should be built without *Tolman's* approval. The first lease prepared by *Tolman* contained such a provision. That submitted by plaintiffs on November 5th provided that the plans and specifications should be submitted, not to *Tolman,* but to such a firm of engineers of the city of Chicago and of established reputation as *Tolman* might select. This was a very proper modification of the agreement of October 16th to contend for if the parties were simply negotiating. The plaintiffs had no right to insist on it if there was nothing left to negotiate.

There was a ten-foot alley running east and west which formed the north boundary line of the leased property. *Tolman* owned property to the north of the alley which was not included in the lease. By the second supplemental agreement *Tolman* agreed to lease such rights as he had in the alley "belonging to and attaching to the said premises south of the alley." *Tolman* construed this provision as requiring him to lease all his rights in the south half of the alley and so provided in the lease of October 28th. The plaintiffs, in

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their lease of November 5th, included "all the rights of the lessor in and to the ten-foot alley." This would shut out the occupant of *Tolman's* property to the north of the alley from the use of it. Some of these matters were adjusted later, but others were left which the parties were unable to adjust.

It would serve no useful purpose to engage in a tedious recital of the various matters of difference between the parties. At one time or another, in addition to the disputes mentioned, they disagreed as to who should assume responsibility for obtaining consent to the assignment of Gimbel Brothers' lease; as to whether *Tolman* should turn over to plaintiffs $5,000 advanced as security for the Sherman Brown lease; as to the payment of certain taxes; as to the ownership of the building when it was completed; as to the amount of the bond to be given; as to whether the interest on *Tolman's* loan should be paid in advance or not; as to conditions under which plaintiffs might assign their lease; as to the liability of the original lessees in case of an assignment; and as to the right of the lessor to increase a mortgage on the property covered by the proposed leases. If the minds of the parties met on a contract, none of them knew it or knew what the contract was. It is argued with much force and reiteration that plaintiffs were willing and ready at all times to accept such a lease as the court finally found was agreed upon. Either the argument is without foundation or else the plaintiffs were acting in bad faith. They asserted the contrary in the two leases which they prepared and submitted, in their communications with *Tolman* while the negotiations were pending, and finally in their pleadings in this action. It is true, they say in the complaint that they have at all times been ready to accept such a lease as the parties agreed upon, but they also say that each of the leases submitted by them conformed to the agreement. This could not be correct in any event, because there were some material differences between the two leases submitted. These differences

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did not consist of particularization in the second lease as to matters which were generally covered by the first one.

The facts are: The lease submitted by *Tolman* on October 28th was unsatisfactory to the plaintiffs. On November 5th they presented a lease drawn by their attorney, which they claimed and probably thought embodied the agreement of the parties. *Tolman* refused to execute this lease because it was not in accordance with his understanding of the agreement. Interviews took place and communications passed between the parties and an endeavor was made to reach an agreement. Some concessions were made, and as a final offer *Tolman* on February 28th submitted a second draft of a lease which was not satisfactory to plaintiffs. Negotiations continued, and on April 16th plaintiffs submitted their ultimatum in the shape of a draft of a new lease, which *Tolman* declined to accept. This practically brought negotiations to an end. By active or tacit consent the parties agreed that they could not agree. It is difficult to see how it can be said that the minds of the parties met on a contract, when neither of them, after six months of effort, was able to say what it was. We have the statement of the court that *Tolman* came nearer hitting the mark than did the plaintiffs, and we are inclined to think the statement is correct, although not very material. The essential point is that neither of the parties knew that they had made such a contract as the court found until the court said so. The plaintiffs then discovered not only that they were prepared to accept the lease drawn by the court, but that they had been willing to do so all the time. A letter written by plaintiffs' attorney to *Tolman* on the day on which the lease of April 16th was transmitted contained this statement:

"I desire to state that my clients stand upon the original agreement and ask no change and have not changed their purpose or intention since the same was executed, of fully complying with the same and signing the lease therein provided,

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and it is you and not them that have held this matter in abeyance.

"Find inclosed leases in duplicate, including a bond which my clients are ready and willing to execute and have been since they signed the original agreement with you. . . ."

Here we have a pretty positive assertion that the leases submitted by plaintiffs contained their understanding of what the contract was. If this is so, then the court's lease did not. If the minds of the parties met on a contract, surely one or the other of them should, after six months of endeavor, be able to tell what it was.

We think the conclusion reached is well supported by the authorities, as will be seen from a reference to the following cases: *Sourwine v. Truscott,* 17 Hun, 432; *McIntosh v. Miner,* 37 App. Div. 483, 55 N. Y. Supp. 1074; *Federal L. & S. Co. v. Hatch,* 147 Iowa, 18, 125 N. W. 837; *Methudy v. Ross,* 81 Mo. 481; *Water Comm'rs v. Brown,* 32 N. J. Law, 504; *St. Louis & S. F. R. Co. v. Gorman,* 79 Kan. 643, 100 Pac. 647; *Bryant v. Ondrak,* 87 Hun, 477, 34 N. Y. Supp. 384; *Laroussini v. Werlein,* 52 La. Ann. 424, 27 South. 89; *Mayer v. McCreery,* 119 N. Y. 434, 23 N. E. 1045; *Buck v. Pond,* 126 Wis. 382, 105 N. W. 909; *Auer v. Mathews,* 129 Wis. 143, 108 N. W. 45; *Poole v. Tannis,* 137 Wis. 363, 118 N. W. 188, 864; *Thoemke v. Fiedler,* 91 Wis. 386, 391, 64 N. W. 1030; *Mississippi River L. Co. v. Wheelihan,* 94 Wis. 96, 68 N. W. 878; 1 Tiffany, Landl. & T. § 64; *Charlton v. Columbia R. E. Co.* 64 N. J. Eq. 631, 54 Atl. 444; *Arnold v. R. Rothschild's Sons Co.* 37 App. Div. 564, 56 N. Y. Supp. 161; *Foster v. Clifford,* 42 Misc. 496, 86 N. Y. Supp. 28; *Donnison v. People's C. Co.* 45 Law T. N. S. 187.

While it is true that, where a contract informal but complete in its terms appears to have been made, it will take effect although the parties contemplate that a more formal contract will thereafter be made, it is also true that writings

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passing between the parties will not be construed as a contract where it is plain that they were intended only as preliminary negotiations, to be followed by a formal contract containing material provisions not contained in or to be inferred from the preliminary writings. *Francis H. Leggett & Co. v. West Salem C. Co.* 155 Wis. 462, 144 N. W. 969, and cases cited.

If we should accept the conclusion that the minds of the parties met on the terms of the lease prepared by the court, we think no recovery should be allowed, because both of the parties breached their contract if they made one, and it was as much the fault of the plaintiffs that the proper lease was not executed as it was that of *Tolman*. The plaintiffs were no more willing than was *Tolman* to enter into the lease drawn by the court, until they found that they had to accept such lease or nothing. There never was any partial performance, unless it can be said that the amount exacted by *Tolman* to indemnify him against expenses for attorney's fees in case no lease was agreed upon constituted such performance. We do not see how this could be, when the money was paid, not on the theory that a contract had been made, but to provide for the contingency that no contract would be made. After many futile attempts on the part of both parties to secure a lease differing from that prepared by the court, negotiations were abandoned. The plaintiffs in effect said they would not accept such a lease as the court found was made, and the defendant *Tolman* said he would not give such a lease. More than a year and a half thereafter, and after *Tolman* had spent $27,000 in repairs and made a ninety-nine year lease to another party, the plaintiffs, conceiving that they were right in their contention as to what the lease should contain, brought this action to compel *Tolman* to execute such a lease as they submitted to him on November 5, 1909, or else such a one as they submitted April 16, 1910. The court held, and was justified in holding, that plaintiffs were not entitled to either of the leases which they sought, but pro-

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ceeded to supply a new one, which up to this time was not satisfactory to any one. We think under the circumstances of this case it was just as incumbent on the plaintiffs to correctly state the terms of the lease as it was upon *Tolman,* and, having breached a duty to the same extent that he did, there can be no recovery.

As a conclusion of law the court found that the duty devolved on *Tolman* to prepare such a lease as the court found was made. The whole burden was placed on him and no significance was given to the conduct of the plaintiffs. We think this conclusion is not warranted by the facts. No doubt it was understood and contemplated by the parties that *Tolman* should present to the plaintiffs a draft of a lease drawn according to his views. For reasons already stated, we do not think it was within the contemplation of either party that this draft would meet the views of both parties. It was the duty of the plaintiffs upon receipt of it to object to the things which they considered objectionable therein. If this were not so, they assumed to perform such a duty. They presented not one lease but two which they insisted contained the true conditions of the agreements, and the ones and the only ones which they were willing to accept. Having assumed the duty of stating what the contract was, why were they absolved from the duty of stating it with substantial accuracy any more than was *Tolman,* and why was not their failure to do so as much a breach of their obligation as was *Tolman's* like failure a breach of his obligation? The conclusion reached on the other branch of the case renders it unnecessary to further elaborate on this one or to treat the question of laches or other questions that were argued at length on the appeal.

By the Court.—The judgment appealed from is reversed, and the cause is remanded with directions to dismiss the complaint.

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PABST BREWING COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

March 21—May 1, 1914.

Municipal corporations: Streets: Change of grade: Railroads: Elevating tracks: Cutting down street: Taking of property: Compensation: Power of eminent domain a continuing one: Trespass: Waiver.

1. The city of Milwaukee has ample power, under its charter, to change the grade of a street for ordinary street purposes by taking proper proceedings therefor, but not to enable a railway company to maintain its tracks in or across the street; nor can it make the railway company its agent for that purpose.
2. The facts that the city in the exercise of its police power required a railway company to elevate its tracks, and that it prepared plans for and supervised the work of the railway company in cutting down a street in front of plaintiff's property so as to pass under the tracks, did not render it a joint trespasser with the railway company.
3. In such case the city possessed authority of a police character to supervise the railway company's operations, but the power to lower the street for such purpose was vested in the railway company alone by virtue of sub. 5, sec. 1828, Stats., subject to the obligation to restore the usable condition of the street and to make compensation for the land taken and the injury done.
4. The fact that the city, without authority, commenced some proceedings purporting to be for the purpose of changing the grade of the street, obviously for the benefit of the railway company, did not affect the question of the city's liability.
5. The lowering of the street some distance back from the railway right of way and in front of a lot which did not abut on such right of way, was a taking for railroad purposes, affording the lotowner the right to due compensation under the eminent domain statute.
6. The competency of a railway company, under sec. 1828, Stats., to acquire land by the power of eminent domain is a continuing one, to be exercised from time to time to suit the exigencies of situations as they arise and have to be dealt with, and is not confined to the original construction.
7. A property owner who knows of the cutting down of a street in front of his property for railway purposes and makes no objection until the work is completed, thereby waives the trespass and elects to rely upon the statutory remedy by appraisal of damages.

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8. Assuming the city to have been a participant with the railway company in the appropriation of the land, the waiver of the trespass necessarily extends to all concerned, leaving the owner no cause of action against the city of any kind and none against the railway company except under sec. 1852, Stats.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action to recover damages to plaintiff's property claimed to have been caused by an illegal change of grade of a street in the defendant city upon which, at the point in question, the plaintiff's lot abuts.

The complaint was to the effect that defendant trespassed upon its premises by participating with the Chicago, Milwaukee & St. Paul Railway Company in cutting down that part of Kinnickinnic avenue upon which its land abuts to correspond to an alleged re-established grade of such street, the street having been prior thereto duly shaped to an established grade which had not been legally changed. The claim of the defendant was that the acts complained of were committed wholly by the railway company to enable it to comply with an ordinance of the defendant as to elevating the railway tracks so that ordinary travel upon the street could pass under such track and that plaintiff failed to protest against such acts for such length of time as to preclude it from using any remedy to recover compensation for injury to its lands by reason of such acts other than the statutory remedy under sec. 1852, Stats.

These facts were established: A long time prior to the occurrence complained of the street in question was duly worked to an established grade, as claimed by plaintiff. The regrading of the street involved a very material physical change thereof. No efficient proceedings were taken by the defendant to change the legal grade of the street. Plaintiff knew of the intention to lower the street in front of its land a considerable length of time before it occurred, knew of the purpose thereof, knew of the operations to that end as they progressed,

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and did not make any complaint until some time after the city ceased actively to make a legal change of grade.

At the close of the evidence defendant's counsel moved for a dismissal upon the ground that it appeared from the evidence, as matter of law, that plaintiff's sole remedy for the taking of its property was against the railway company under the eminent domain statute.

The motion was denied. The court then submitted the question of damages to the jury, resulting in a verdict assessing such damages at $1,000. Judgment was rendered for plaintiff accordingly.

For the appellant there was a brief by *Daniel W. Hoan*, city attorney, and *Clifton Williams*, first assistant city attorney, and oral argument by *Mr. Williams*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, attorneys, and *I. A. Fish*, of counsel, and oral argument by *Mr. Fish*.

MARSHALL, J. The question here is this: Should not respondent have made its claim solely against the railway company? The street was not cut down for street purposes but for railway purposes. Had it not become necessary for the railway company to raise its tracks, no change in the physical characteristics of the street would have occurred. The city had ample power to change the grade for ordinary street purposes by taking proper proceedings to that end; but not to enable the railway company to maintain its tracks in or across the street, nor make the railway company its agent therefor. That seems so on principle and in spirit, at least, this court so concluded in *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264, 19 N. W. 56.

The city charter of *Milwaukee*, as to grading and changing grades, has reference to shaping streets for street purposes but not to aiding in the construction or maintenance of a railway. The only power a railway company has for interfer-

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ence with a public street or highway, is referable to sec. 1828, sub. 5, of the Statutes, which confers upon such company, subject to the provision of sec. 1836, authority "to construct its railroad across, over, under, along or upon any . . . highway, . . . to carry any highway . . . over or under its track, as may be most expedient for the public good; to change the course and direction of any highway . . . when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the construction of the railroad and take land necessary therefor," etc.

The subject condition is: "Shall restore . . . every highway . . . across, along or upon which such railroad may be constructed to its former state or to such condition as that its usefulness shall not be materially impaired . . ."

The company, here, did not obtain any authority from the city, except within the field of police power. Therefore, the mere fact that city officials furnished plans for the work and looked after it as regards city regulations did not change the nature of the work. It was a railroad matter from start to finish, referable, not to any power which the city possessed to lower the street, but wholly that conferred upon the railway company by statute. *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 14 N. W. 273; *Shealy v. C., M. & N. R. Co.* 72 Wis. 471, 40 N. W. 145; *Shealy v. C., M. & N. R. Co.* 77 Wis. 653, 656, 46 N. W. 887.

The foregoing seems to answer the claim that the appellant was a joint trespasser with the railway company. To restate the matter, in brief, appellant did not confer any authority on the railway company to cut down the street for railway purposes. It did not possess power to do so. The street was cut down for such purpose. The statute conferred authority so to do subject to the obligation of the railway company to restore the usable condition of the street and to compensate for the land taken and injury done. The city

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possessed authority of a police character to supervise the railway company's operations. That, without authority, it commenced some proceedings purporting to be for the purpose of changing the grade of the street, obviously, for the benefit of the railway company, does not cut any figure in the case.

Whether the interference with the street for some distance back from the old right of way and in front of plaintiff's lot, which did not abut on such way, was a taking for railway purposes, affording the owner the right to due compensation under the eminent domain statute, is ruled in the affirmative by the cases cited. They are precisely like this case, except that the disturbances there were in the original construction, while here it was for the purpose of a change which the city required under its police power to be made.

In the last case cited the court said: "The lowering by a railroad company of the grade of the highway, in order to adjust such grade to that of its track laid across the highway," is "a taking of the property of the owner of the lots abutting on the highway, for which, and for the consequent injury to said lots, the company must make compensation, though the track itself" does "not encroach upon that part of the highway of which the fee" is "in the owner. In case the railroad company, in order to perform its legal duty to restore the highway it occupies with its track, is compelled to take and carry away the soil of an adjoining lot, . . . compensation must be made to the owner of the property thus taken and injured. . . . The company has no right to make the excavation and grading in the highway for the purposes of a railroad track without making compensation." In the previous case cited, it was distinctly held that authority is given by statute to a railway company to cut down the street on either side of its ordinary right of way for the purpose of a crossing and that the land so taken is a part of its right of way in the broad sense and within its eminent domain rights.

In the second appeal in the *Buchner Case* (60 Wis. 264,

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19 N. W. 56), the point was particularly considered as to whether, in the circumstances of this case, there is a taking and the court said: The construction of a railroad "across, along or upon a highway" "is clearly a taking, within the meaning of the constitution, in each of the cases named. No one would, we apprehend, claim that the clause of the statute requiring condemnation and compensation does not apply when the railroad is constructed 'along or upon a highway,' nor to so much of the street occupied by the railroad in crossing a highway. So it seems to us that it applies to that portion of the highway which the railway company, as a condition of constructing its railroad across, along or upon a highway, is required to restore to its former condition of usefulness. This 'change' of the highway necessitated by the construction of the railroad must, therefore, be a taking, within the meaning of the constitution, and since it must thereafter be permanently maintained by the railway company, there must necessarily be condemnation and compensation." In further discussion the court held, as must be the case, that the taking by a railroad for railroad purposes, which falls within the scope of its condemnation privilege within the limitations of the statute, extends to all lands which it is necessary for it to take to maintain its road.

It would seem, in the light of the foregoing, that no more need be said; but the question may be raised as to whether it applies to the acquirement of lands necessary to enable a railway company to make necessary changes in its track, after the original construction. If not, we have this anomalous situation: in case of development of the country and requirement for additional and improved railroad service, rendering necessary, to that end, additional tracks, straightening of tracks, reduction of grades, increase of yard or terminal facilities, or abolishment of surface crossings, whether by its own initiative or by coercion to comply with legitimate regulations,—no power exists to acquire land needed therefor. The statute has not been so construed. Within its limita-

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tions, pretty broadly construed, it has always been supposed that a railroad company's competency, under its corporate authority, to acquire land by the power of eminent domain, is a continuing one to be exercised from time to time to suit the exigencies of situations required to be dealt with. That has been supposed to be within the letter as well as the spirit of the statute. Sec. 1828 confers power "to acquire . . . all such real estate . . . as may be necessary for the construction, maintenance and operation of its railroad," etc. That does not mean original construction only. It extends to new construction, as necessary from time to time. Note the significance of the term "maintenance and operation." The provision was evidently intended to cover all the necessities of railroad "construction, maintenance and operation." So the word "construction" in sec. 1836 refers back to sec. 1828. It includes construction at any time whether in the nature of an improvement or an addition necessary to proper maintenance and operation. That was taken for granted in *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264, 275, 19 N. W. 56, where the court in discussing the duty of a railroad corporation under sec. 1836 to "restore every . . . highway . . . across which such railroad may be constructed, to its former state or to such condition as that its usefulness shall not be materially impaired and thereafter maintain the same in such condition against any effects in any manner produced by such railroad," said, "such continuing duty is coupled with a supposed permanent right, and necessarily imposes a new burden or servitude upon the abutting owner's private interest and property in the land constituting the highway. Besides, there is a possibility that the" railroad company "may still further lower or elevate its track, which would necessitate further changes in order to restore the highway to a condition of usefulness." That is to say, as the duty of the railroad company is continuing, its right to take and the condition of the taking are necessarily continuing. That has become so well established as to now be regarded as

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elementary. In 3 Elliott on Railroads, § 930, Judge Elliott phrases the matter thus:

"It is firmly settled by the weight of authority that making one appropriation does not exhaust the power, but new appropriations of land for the construction of additional tracks, turnouts, engine houses and other railroad facilities, may be made from time to time as the necessities of the road may require."

The absurdity of the contrary of the foregoing is referred to in the notes to the text above quoted, thus:

"It would be, indeed, a disastrous rule to hold that a railroad company must, in the first instance, acquire all the ground it will ever need for its own convenience or the public accommodation. . . . The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility."

No better illustration could be given of the necessity of the statutory right of a railroad to appropriate property for railroad purposes than this case and similar situations liable to arise frequently in the future. If the right does not exist the police power of the state could be paralyzed. While it might require a railroad company to abolish a dangerous crossing, its mandate could not be observed except at the pleasure of the owners of property required in order to make the change.

Thus it seems plain, as said in the beginning, that the appropriation of plaintiff's property was by the railroad company for its use. It had power to take the property under certain conditions. The defendant did not have power to take it for railroad purposes at all. As said in *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 417, 14 N. W. 273:

"The obligation of the company to make compensation for the land thus taken and the consequent injury is just as clear and certain as its obligation to pay the laborers it employed to do the grading, or for the tools which they used. All was done for its benefit alone. The people received no benefit of

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the work—enjoyed no advantage from it that it did not have as fully and amply before the railroad was constructed."

The plaintiff, as in the *Buchner Case,* made no objection until after the appropriation was complete by reconstruction of the railroad track and cutting down of the street in order to restore the usefulness of the way at the crossing. In the appropriation, the railroad company was a trespasser; but it was competent for the plaintiff to waive the trespass and rely on its statutory remedy to have its damages caused by the appropriation determined and paid, the same in practical effect as if the company had proceeded to acquire a right to make the appropriation by the exercise of the power of eminent domain. Sec. 1852, Stats. It was held, in effect, in the *Buchner Case,* that a delay on the part of the landowner until the improvement is largely completed is in effect an election to rely upon the statutory remedy. That was expressly reaffirmed in *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623; *Milwaukee & N. R. Co. v. Strange,* 63 Wis. 178, 23 N. W. 432; *Taylor v. C., M. & St. P. R. Co.* 63 Wis. 327, 24 N. W. 84; *Chicago, M. & St. P. R. Co. v. Richardson,* 86 Wis. 154, 160, 56 N. W. 741; *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, 64 N. W. 1038, and many other cases.

If plaintiff ever had a cause of action against the appellant for trespass, in that it was a participant with the railway company in the appropriation of its land, the fact remains that the appropriation was for railway purposes, not for street purposes. In such circumstances the election to waive the trespass as to the railway company and impliedly rely upon its statutory right to claim compensation upon implied contract, necessarily waived the trespass as to all concerned, leaving it no cause of action against appellant of any kind and none against the railway company, except under sec. 1852 of the Statutes.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the same with costs.

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INTERNATIONAL HARVESTER COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

March 21—May 1, 1914.

Workmen's Compensation Act: Permanent partial disability: Impairment of sight of one eye: Lessened capacity to get work: "Employment" in which person was working: Industrial commission: Findings must be based on evidence: Record on review: Judicial notice: What constitutes evidence.

1. Under sec. 2394—10, Stats. 1911, no compensation could be awarded to an injured employee for permanent disability unless there was "impairment of his earning capacity in the employment in which he was working at the time of the accident."
2. An injury to a drill-press operator resulting in material impairment of the sight of one eye was a sufficient ground for awarding compensation as for a permanent partial disability, although the injured employee was taken back by the employer as soon as he was able to work, and was able to earn as much as before in the same employment, if in fact manufacturers operating drill presses would be less likely to hire him because of his injury or disfigurement.
3. Sec. 2394—16, Stats. 1911, provided for a full and fair hearing upon the merits, and this necessarily included the right of both parties to know what the testimony taken without notice tended to prove; and the law clearly contemplated that the parties should have the right to meet any new matter.
4. The findings of fact made by the industrial commission must have some support in the evidence, and such evidence must be made a part of the record which is returned to the circuit court for review.
5. To find essential facts which have no support in the evidence is outside of or in excess of the powers of the commission, and under sec. 2394—19 is ground for setting aside its award.
6. It is not a matter of common knowledge, of which judicial notice can be taken, that a drill-press operator who had partially lost the sight of one eye would probably be discriminated against in the matter of employment.
7. A finding by the industrial commission in this case that, although the partial loss of the sight of one eye had not impaired the ability of a drill-press operator to do a full day's work in that occupation, yet that there was a permanent partial disability because, on account of such partial loss of sight, employers would be less likely to hire him, is *held* not to be supported by any evidence.

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8. A bulletin of the commission containing statements by forty-nine persons who had lost the sight of one eye, three fourths of whom stated that their injury had no effect on their earning capacity and none of whom stated that such an injury would affect the earning capacity of a drill-press operator, and showing that thirteen of such persons were asked whether they had been discriminated against in the matter of securing work and but one (whose ambition was to become a railroad man) gave an affirmative answer—did not tend to support the finding above mentioned.
9. Statutes and legislative and administrative rules of other states, rulings of the United States pension board, and an award by the industrial accident board of another state—all of which the industrial commission stated that it had considered in reaching its conclusion, but which were not made a part of the record—did not constitute evidence on which the finding of fact could rest.
10. Operating a drill press is an "employment" within the meaning of sec. 2394—10, Stats. 1911.

TIMLIN, SIEBECKER, and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Ernest Koenig, an employee of the plaintiff, was injured on March 5, 1912, by reason of a particle of steel entering one of his eyes. The piece of steel was removed by a magnet, but the employee was incapacitated from working for a considerable length of time. He was paid for his loss of time while unable to work, and doctors' bills, as provided in the Workmen's Compensation Act. The sight of the eye was not destroyed, but it was materially impaired, and the employee instituted this proceeding against the employer to recover compensation for alleged permanent partial disability. The *Industrial Commission* found that the applicant was totally disabled from performing work for ten weeks and four days, and that he was partially disabled thereafter, to the extent of a permanent loss of weekly wage of fifteen per cent.; that the average annual earnings of the applicant at the time of the injury amounted to $750; that the applicant's loss of wage because of his permanent partial disability

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amounts to $2.16 per week. The employer was ordered to pay the applicant $58.42 for compensation to March 10, 1913, and to pay him thereafter the sum of $1.41 per week until the expiration of the period of fifteen years from March 5, 1912. Other facts will be sufficiently stated in the opinion. The plaintiff brought an action in the circuit court for Dane county to set aside the award. In that court the award of the *Industrial Commission* was sustained, and plaintiff appeals to this court.

For the appellant there was a brief by *Vroman Mason* and *David A. Orebaugh,* attorneys, and *Edgar A. Bancroft,* of counsel, and oral argument by *Mr. Mason.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Byron H. Stebbins,* assistant attorney general, and oral argument by *Mr. Stebbins.*

For the respondent *Koenig* there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *W. B. Rubin.*

BARNES, J. The appellant makes the following contentions: (1) That unless the earning capacity of the claimant *in the employment in which he was engaged* at the time he was injured has been impaired, there can be no recovery for permanent disability; (2) that the undisputed evidence in the case affirmatively shows that there was no such impairment; and (3) that there is no support in the testimony for the finding of the *Industrial Commission* that there was.

1. The correctness of appellant's first contention cannot be gainsaid. The statute, sec. 2394—10, Stats. 1911, provides that the loss in wages for which compensation may be made shall consist of such percentage of the average weekly earnings of the injured employee as shall fairly represent "the proportionate extent of the impairment of his earning capacity *in the employment in which he was working at the time of the accident.*" This court has held that this statute

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was plain and meant just what it said, and recovery was allowed for total disability because the employee was unfitted by his injury to follow the occupation in which he was engaged when injured, although it was shown without dispute that he was capable of earning substantial wages in other occupations. *Mellen L. Co. v. Industrial Comm.* 154 Wis. 114, 142 N. W. 187. This statute does not mean one thing when it is to the advantage of one employee to so maintain, and at the same time mean something directly contrary when it is to the advantage of some other employee to make a different claim.

2. The claimant had been operating a drill-press in the plaintiff's factory for about a year before he was injured, and before that time had worked for another company at the same occupation. He was laid up for over ten weeks and incurred considerable expense for doctors' services. These items were taken care of by the plaintiff as provided in the Compensation Act. The claimant did piece work, the amount of work turned out determining the amount of his compensation. Before the accident his average daily earnings during the time he had worked for the plaintiff amounted to $2.50. Ten weeks and four days after the accident he went back to work. When the claim for compensation was heard before the *Industrial Commission* he had worked forty-four and one-half days at his former employment, doing piece work, and had earned a little over $3 per day. The *Industrial Commission* in its decision said that it was "satisfied from its investigation of injuries of this character and from the testimony that a man injured as applicant was injured can perform the labor that applicant was doing prior to his injury without difficulty." It further said: "The *Commission* is also convinced that in most employments a one-eyed man is physically able to earn substantially the same wage as a man with two eyes."

The *Commission* fully sustains the contention of the plaintiff that the claimant is capable of earning as much as before

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he was injured in the employment in which he was then engaged, but awarded compensation on the theory that employers would be less likely to hire him because of the partial loss of sight in one eye. There was no claim that the injury had affected or would affect the sight of the other eye. The plaintiff urges that the injured employee was taken back as soon as he was able to work, and continued in his employment, and that it therefore conclusively appears that he was not discriminated against because of his injury. This argument is inconclusive. The plaintiff may at any time dispense with the claimant's services and the claimant may become dissatisfied with his employer. If it is a fact that manufacturers who operate drill-presses discriminate against employees who have lost part of the use of one eye, then the claimant may find himself out of employment a part of the time when he could otherwise secure work, particularly at times when labor is plentiful and jobs are scarce. The fact that the applicant is entirely fit to perform a full day's work, while it may be some consolation to him, does not replenish the dinner pail if the work cannot be had. It may be difficult to ascertain the amount of the loss, but if the claimant must submit to enforced idleness because of his injury, then he certainly suffers loss, the extent of which must be measured largely by the probable extent of the loss of time that is likely to be suffered on account of the injury. The highest court of England has decided that an injury or disfigurement which destroys or impairs the injured workman's capacity to get work is an element to be taken into consideration in the assessment of compensation. *Ball v. Hunt & Sons,* 81 L. J. K. B. 782, 787. It is not difficult to imagine employments where mere disfigurement would preclude a person from being employed altogether, although physically capable of doing the work in a satisfactory manner.

3. The contention that there is no evidence whatever to support the award made raises an important question which

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has been given a good deal of consideration and which necessitates a discussion of some of the provisions of the Workmen's Compensation Act.

This statute, while providing for a review by the courts of the award of the *Industrial Commission,* unlike the Railroad Commission Law does not permit a trial *de novo* in the circuit court. That court may set the award aside on three grounds only: (1) That the *Commission* acted in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award. Sec. 2394—19, Stats. 1911. Where an award is attacked as having been procured by fraud, it is probable that the statute contemplates that evidence may be taken on this issue in the circuit court. Whether this be correct or not, it is certain that this is the only ground on which the circuit court can consider any facts not found in the record as returned. Both parties must offer any testimony they wish to adduce before the *Commission* except on the issue of fraud. If they fail to do so, they are precluded from offering it at all.

Sec. 2394—16, Stats. 1911, carefully prescribes the powers and duties of the *Commission* in regard to taking testimony, in the following words:

"Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the board; but the board may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing."

Under this statute either party has the right to present any testimony pertinent to the controversy. The *Commission*

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may take testimony on its own motion without notice to either party. It may also inspect the time books and pay rolls of the employer, as well as the premises where the accident occurred. It may direct the claimant to submit to a medical examination. The testimony and the results of the inspection must be reported to the *Commission,* to the end that the *Commission* may consider them and that either party may have the right to rebut the same at the final hearing.

The hearing before the *Commission* is the only one either party ordinarily ever gets on the merits. Once the award is made, except in cases of fraud, relief can be had only because of jurisdictional errors or errors of law. The statute carefully provided for one full and fair hearing on the merits. This necessarily included the right on the part of both parties to know what the testimony taken without notice tended to prove. Otherwise it could not be met, no matter how successfully the party against whom it operated might meet it if he knew what it was. To dispel any doubt about the matter, the statute required all the evidence not taken at the original hearing to be laid before the *Commission* before the final hearing ended. This necessarily implies that the testimony taken *ex parte* is laid before the parties. Once filed with the *Commission* it becomes a public record which either party may examine and the law clearly contemplates that the parties shall have the right to meet any new matter. Had the statute been less explicit the proceeding would be the same, under the rule in *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595, and in *State ex rel. Arnold v. Common Council of Milwaukee, post,* p. 505, 147 N. W. 50. If it was a fatal jurisdictional error, as is held in the *Arnold Case,* to refuse to hear argument on the part of the relator because it denied a common-law hearing, it would be a much more serious and prejudicial error to decide an important controversy on evidence which the defeated party did not and could not know of.

It will be further noticed that the section quoted specifies

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just what the *Commission* may consider in the way of evidence. It may take into account (1) testimony offered, whether taken *ex parte* or not, where the parties are afforded an opportunity for rebuttal; (2) such inspection as it may make of the time books and pay roll of the employer; (3) the result of any medical examination that may be ordered.

As further bearing on the duty of the *Commission* to preserve and place before the parties all testimony on which it acted, sec. 2394—19 might be referred to. This section requires the *Commission,* when suit is brought to set aside an award made by it, to return to the circuit court all documents and papers on file in the matter *and all testimony which may have been taken therein.* Obviously, this is essential if the court is required to examine the record to ascertain whether there is any evidence to sustain the findings made. The court cannot pass upon such a question unless it knows what evidence the *Commission* had before it.

This same section (2394—19) provides that the findings of fact made by the *Commission within its powers* shall in the absence of fraud be conclusive. This leads to the query: Is it within the power of the *Commission* as set forth in the law to make a finding of fact not supported by any evidence whatever? This feature of the law was attacked in the original suit brought to test its constitutionality and was considered by the court, and it was there decided that if the *Commission* acted outside of its powers its decision was open for review to the extent that decisions of various other bodies are reviewable on *certiorari.* Continuing, the court said:

"In such cases it is considered that clear violations of law in reaching the result reached by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error and will justify reversal of the board's action, as well as the failure to take the proper steps to acquire jurisdiction at the beginning of the proceeding. *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188." *Borgnis v. Falk Co.* 147 Wis. 327, 358, 359, 360, 133 N. W. 209.

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The statute contemplates and provides for a full and fair hearing and that the decision of the *Commission* shall be based on evidence and not arbitrarily made. It would seem to be clearly outside of its powers to find essential facts that had no support in the evidence. This is one of the grounds specified in sec. 2394—19 on which the courts may review the award made by the *Commission.*

In a number of cases following the decision in *Borgnis v. Falk Co., supra,* the interpretation there given to the law has been followed. *Northwestern I. Co. v. Industrial Comm.* 154 Wis. 97, 103, 142 N. W. 271; *Nekoosa-Edwards P. Co. v. Industrial Comm.* 154 Wis. 105, 108, 141 N. W. 1013; *Milwaukee v. Miller,* 154 Wis. 652, 144 N. W. 188.

The rule in *certiorari* cases is that, if in any reasonable view of the evidence it will support the conclusion arrived at, such conclusion will not be disturbed for want of support in the evidence. If, however, the finding has no support in the testimony, there was no jurisdiction to make it. *State ex rel. Miller v. Thompson,* 151 Wis. 184, 187, 188, 138 N. W. 628; *State ex rel. M. A. Hanna D. Co. v. Willcuts,* 143 Wis. 449, 453, 128 N. W. 97; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Edward Hines L. Co. v. Fisher,* 129 Wis. 57, 108 N. W. 206. From what has been said it is obvious that there must be some support in the evidence for findings of fact made by the *Industrial Commission* and that such evidence must be made a part of the record that is returned to the circuit court for review.

This brings us to a consideration of the evidence taken on the hearing which is before us and which consists of sworn testimony taken before the *Commission* and a statistical report compiled and published by the *Commission.* Sec. 2394—52, sub. 10, authorizes the *Commission* to collect, collate, and publish statistical and other information relating to the work under its jurisdiction and to make such public reports thereof as it deems necessary. This report was laid before the parties, and might be considered as evidence by the *Commission.*

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Chicago & N. W. R. Co. v. Railroad Comm. 156 Wis. 47, 145 N. W. 216.

There was no testimony given by any witness to the effect that drill-press operators who had the sight of one eye impaired were discriminated against by employers. Whatever evidence is contained in the record to support the finding of the *Commission* is found in pages 152 to 162 inclusive of a bulletin issued by the *Commission* under date of March 30, 1913 (vol. 2, No. 6).

This bulletin contains statements made by forty-nine different persons who at some time in their lives had lost the sight of one eye. The inquiries were directed to two subjects: (1) The ability to do work after the accident, and (2) the ability to secure employment. Only thirteen of the persons interrogated were interviewed on this specific point. Less than one fourth of the persons interviewed stated that they thought they might have done better had it not been for their injury. The remaining three fourths said their injury had no effect on their earning capacity. No one stated that such an injury would affect the earning power of a drill-press operator. On this report, in part at least, the *Commission* reached the conclusion, as before stated, that the claimant's ability to do a full day's work in the occupation in which he had been engaged was not impaired. Of the persons specifically asked as to whether they had been discriminated against in the matter of securing work because of the loss of an eye, but one gave an affirmative answer. He said he had been "refused employment, as his ambition was to become a railroad man, but the loss of the eye proved to be a handicap." The others all stated that the injury did not prove to be a handicap in the matter of securing work. This evidence, instead of tending to support the finding of the *Commission,* if it is of any value, strongly tends to support an opposite conclusion. It cannot be that because one person lost an eye when he was a boy and was thereby

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disabled from entering the railroad service, it follows that the claimant would be refused employment as a drill-press operator because of the partial loss of the sight of one eye.

The *Commission* did not base its finding on evidence laid before the parties or on anything that can be considered evidence under the statutes referred to. In its memorandum decision filed with the award it states what it considered in the following language:

"It has caused an investigation to be made of a great many cases where one-eyed men are actually at work in various employments. The result of this investigation is in print and is made the subject of public report. The *Commission* has given consideration to various compensation acts in this and other countries, and has considered the legislative and administrative rules with reference to compensation in such cases. It has considered the conclusions and results of the United States Pension Board in making pension allowances in cases of similar injuries. The *Commission* also has before it an award made by the California Industrial Accident Board under a provision in the California Compensation Act, identical with the provisions in this act.

"From all of the information that the *Commission* has at hand, it concludes that under our act the loss of earning capacity because of the loss of the sight of one eye is equal to fifteen per cent. of the employee's earning capacity at the time of the injury.

"Therefore an award will go in favor of the applicant based on a loss of fifteen per cent. of his earning capacity as determined by the evidence."

This award was made about eight months after the final hearing took place. What compensation acts were considered and what provisions they contained, we do not know, and the parties did not know. The same is true of the legislative and administrative rules referred to, as well as the conclusions of the United States Pension Board which are mentioned. We have no means of knowing whether the statutes referred to are similar to our own or otherwise. It is difficult to see

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wherein any of these things could constitute evidence on which the finding of fact made could rest. The decision of the California commission was not returned with the record and presumably was not put in evidence. We have examined it and cannot see how it even tends to prove any fact upon which the award here made might be sustained, even if we could consider it. The narrow question here is: Was there any evidence tending to show that the claimant could get steadier work as a drill-press operator with two good eyes than he could with the sight of one impaired? How statutes of other states or rules for their enforcement or rulings of the pension board or of the California commission could affect this question is not apparent. But if they do, the parties were entitled to know what statutes and rules were relied on, to the end that they might present evidence to the contrary, or at least argue to the *Commission* that they did not tend to establish liability. *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595; *State ex rel. Arnold v. Common Council of Milwaukee, post,* p. 505, 147 N. W. 50.

The circuit court was evidently unable to find any evidence in the record to support the finding of the *Commission.* The learned judge in his decision said:

"In determining whether such findings are supported by the evidence, the court must consider all matters of which judicial notice will be taken. The evidence establishes the fact that the loss of one eye affects the ability of the applicant to judge distances. It is a matter of such common knowledge that judicial notice will be taken of it, that preference will generally be given to men with two eyes, who can correctly judge distances, when they are to be employed upon such machines as that upon which the applicant is working."

We entertain a high regard for the opinion of the circuit judge in this as well as in other matters. But we are obliged to disagree with him. The persons interviewed by the *Industrial Commission* seem to do likewise, and they ought to know what the fact is. If it be true that persons injured as

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was the applicant are discriminated against in the matter of employment in any considerable number of callings, including that of drill-press operator, the majority of this court does not know it and never heard of it, and we venture to say that not one person in five hundred has any advantage over us in this respect. We are referred to no source from which this knowledge can be obtained. It is perhaps quite generally known that soldiers, and seamen on war vessels, must pass a physical examination before they will be received into the army or navy, and that railroad companies require their trainmen to pass a like examination. But to say that the ordinary farm or factory hand is refused employment because the sight of one eye is impaired, not only passes the domain of common knowledge, but in so far as our observation has extended it is untrue as a matter of fact.

It may be that the Compensation Act will have a tendency in the direction indicated in the opinion of the trial court, although it is not apparent why this should be so. However, accidents of this class are too infrequent and the Compensation Act has been in force too short a time to enable a court to say that it is a matter of common knowledge that the discrimination exists. A fact must be pretty well known and pretty obvious besides before it can be taken judicial notice of.

It is urged in the brief of counsel for the claimant that working at a drill-press is not an employment, that the claimant's ability to earn in some callings is impaired, that the law contemplates that he shall have compensation for the injury received, and that there was no intention to have this compensation "doled out with an apothecary's scales." The argument is plausible, but not convincing. Courts are no more above the law than are individuals. If judges are to perform the duties they have sworn to perform, they must leave the duty of enacting statutes to the legislature. In case of doubt as to the meaning of a statute they must construe it, but never, intentionally at least, amend it. The aim

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in all cases should be to find out what the legislature really meant, and not to stretch or distort language so as to make the law as the court thinks it should be for the purposes of the individual case under consideration. It would be an easy matter to say in this case that there is some evidence to sustain the finding of the *Commission*. But unless we were able to point it out, it would reflect no credit on the court to say so.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with directions to set aside the award of the *Industrial Commission* and to either remand the record to said *Commission* for further hearing or enter final judgment in plaintiff's favor, as the court may deem just.

TIMLIN, J. (*dissenting*). I am unable to agree with the majority decision in this case. It proceeds, first, upon the erroneous assumption that there was no evidence of future disability in the case except that derived from the books, pamphlets, and documents consulted by the *Commission*, the use of which is disapproved; second, upon the erroneous assumption that these were necessarily consulted as original evidence; and third, upon the erroneous view that orders of the *Commission* can be reversed for improper admission of evidence. It was in evidence that the claimant lost an eye, and in the exercise of common knowledge and observation the *Commission* was authorized to infer from this that his capacity to obtain employment was impaired. There is, in my opinion, no case made out for a reversal of the order of the *Commission* under sec. 2394—19, Stats., and the case of *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, has no relevancy to the questions here presented.

Summed up, the majority decision means that where there is a visible, permanent injury consisting of the loss of a member, the *Commission* cannot upon this evidence, together

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with the evidence of the kind of work at which the injured person was engaged at the time and the amount of wages received, decide upon the extent of the prospective or future impairment of his earning capacity because of his impaired opportunities for obtaining employment by reason of the disability. I think this is not only contrary to principle, but also that it materially impairs the efficiency of the *Industrial Commission*. The majority of the court must have arrived at the foregoing conclusion in order to hold that there was prejudicial error in making the investigation and consulting the records and documents referred to by the *Commission*. For surely the decisions of the *Commission* are not to be upset because they read not wisely but too extensively, if there are other facts in evidence in the case supporting their decision. I think a more liberal rule should apply to an administrative body of this kind than to a formal trial in court. In the latter case the jury might make this estimate "from the facts and circumstances in proof and by considering them in connection with their knowledge, observation, and experience in the business affairs of life." *North Chicago St. R. Co. v. Fitzgibbons,* 180 Ill. 466, 54 N. E. 483; *Baltimore & O. S. W. R. Co. v. Keck,* 84 Ill. App. 159; *Houston & T. C. R. Co. v. Harris,* 30 Tex. Civ. App. 179, 70 S. W. 335; *Feinstein v. Jacobs,* 15 Misc. 474, 37 N. Y. Supp. 345; 8 Am. & Eng. Ency. of Law (2d ed.) 641, 642.

In *Rosenkranz v. Lindell R. Co.* 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588, it is said to be well settled that prospective damages to adults on account of impairment of earning capacity in the future is a proper element of damages, and that proof should be made of previous physical condition and ability to labor or follow his usual avocation, as well as of his condition since the injury, to enable the jury to properly find the pecuniary damage. I think this is all the basis for such finding that is considered necessary. That was a case of injury to a child four years old, and the jury were

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confronted with the task of determining the extent of impairment of his earning capacity after he reached the age of twenty-one and in case he reached that age. It is said:

"It is properly held in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience and 'enlightened conscience of the jurors, guided by the facts and circumstances in the case.'"

In *Fisher v. Jansen,* 128 Ill. 549, 21 N. E. 598, citing *Chicago v. Major,* 18 Ill. 349, it is said:

"In this, as in all other cases, it was proper for the jury to exercise their own judgment upon the facts in proof, by connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind."

See, also, *Chicago v. Scholten,* 75 Ill. 468, 471, and other cases cited and commented on in *Fisher v. Jansen, supra.*

We also permit a jury, from evidence of the mere fact of wrongful act causing death, relationship of the beneficiary, age and financial circumstances of the deceased, to award damages for prospective loss of support and for the probable loss of a legacy or devise of property not yet earned and which may never be earned by the decedent. *Castello v. Landwehr,* 28 Wis. 522.

Where the injury resulted in the loss of a limb or member and that result is patent, and the jury have the plaintiff's age, occupation, and former earnings before them, they have, I think, quite uniformly been allowed to estimate from these data the probable future impairment of earning power. Impairment of capacity to obtain employment is impairment of earning capacity. I recall cases in this state where an infant of tender years, on proof merely of his age and injuries, was allowed to recover for impairment of earning power which would begin far in the future after the infant had arrived at the age of twenty-one. In cases in which the injured party may or may not be restored to health, it is necessary to

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produce evidence that the disability existing at the trial will be reasonably certain to continue. *Block v. Milwaukee St. R. Co.* 89 Wis. 371, 61 N. W. 1101. But I do not think this rule applies where there is a loss of an eye or an arm or a foot.

I do not think the *Commission* committed any reversible error in examining the books and papers mentioned. These were not in the nature of evidence, but merely argumentative and advisory upon the other facts above referred to and properly before the *Commission*. I think the employment in which the servant was working at the time of the accident is referred to in the statute more for the purpose of fixing the measure of compensation than for any other purpose. Even if they were evidence and incompetent, this would not be ground for reversal. I am unable to understand how the order in question of the *Commission* can be reversed under a statute which forbids the court to set aside the order of the *Commission* unless the latter acted outside of or in excess of its power, or that the order was procured by fraud, or that the findings of fact of the *Commission* do not support the order. The second and third grounds are entirely wanting, so that this order must have been reversed upon the ground that the *Commission* acted outside or in excess of its power in awarding compensation for impaired earning capacity, merely because, having the evidence of the nature of the injury, the occupation, age, and earnings of the servant, the *Commission* read up concerning what other administrative *quasi*-judicial or judicial tribunals did with reference to amount under similar circumstances.

Justices SIEBECKER and KERWIN concur in this dissent.

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LOTHARIUS, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.
SAME, Respondent, vs. SAME, Appellant.

April 9—May 1, 1914.

Street railways: Negligence: Injury to person on track: Contributory negligence: Demurrer: Order for judgment.

1. In an action for personal injuries alleged to have been caused by defendant's negligence, where the complaint shows that plaintiff's automobile stopped on the east track of the defendant's street railway; that in attempting to adjust the mechanism so as to start it plaintiff stood on the west side of the automobile so near the west track that a car thereon could not pass without striking him; that there was nothing to prevent him from seeing an approaching car or from stepping aside to avoid it; and that as he stood facing south, a car on the west track coming from the north struck and injured him,—it is *held* that a demurrer to the complaint was properly sustained on the ground that plaintiff was guilty of contributory negligence.
2. Where, upon overruling a demurrer to the complaint, it was ordered that plaintiff "have judgment thereon, but with leave to the defendant to answer," this did not mean that upon defendant's failure to answer plaintiff could have judgment otherwise than according to law, *i. e.* after making due proof of the alleged cause of action.

APPEALS from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action to recover damages for a personal injury brought in the circuit court for Milwaukee county.

The plaintiff in his complaint alleges the following: That he was a resident of the city of Milwaukee at the time of the accident, to wit, July 1, 1912; that he was employed as a chauffeur and was driving his automobile along Third street in the city of Milwaukee, upon which street the defendant, a corporation organized under the laws of this state, is operating its street cars under a franchise from the city of Milwaukee. At the point where the accident occurred on Third

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street there are double street-car tracks. Between 6 and 7 o'clock in the evening the plaintiff was driving his automobile, occupied by three passengers and himself, in a northerly direction on the east side of the street near the intersection of Third and Galena streets. The east wheels of the automobile were to the east of the west rail of the east railway track upon which the street cars ran north, and the west wheels of the automobile were on the west side of such rail, and allowed sufficient room for street cars going south on the west track to pass it. The motive power of the automobile gave out and it stopped, and the plaintiff immediately got out to ascertain what caused it to stop and to adjust the parts of the driving apparatus, to avoid delay of traffic on the street-car tracks. He looked to the south and saw a car approaching, at a distance, from that direction, and then looked to the north and saw no car approaching from that direction. It is alleged that he could see several blocks to the north. It is also alleged that he then stepped to the west side of the automobile close to the west track; that he stood facing southeasterly with his back to the north, and at once proceeded to adjust the mechanism of the engine, and while in this position a street car going in a southerly direction at a high rate of speed struck him, threw him a great distance, and permanently injured him. He charges that the street railway company was negligent in running its cars at a high and dangerous rate of speed, and in not keeping a vigilant lookout so as to discover travelers on the tracks, and in not giving any warning of the approach of the street car. It is alleged that he was plainly visible to any one approaching from the direction that the street car came, and that the employees in charge of the car, in the exercise of ordinary care, ought to have seen him and have given him warning of the approach of the street car, and if necessary to have stopped it and have avoided colliding with him.

The plaintiff for a second cause of action alleges and

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charges that the defendant's servants in charge of the street car were guilty of gross negligence constituting wilful misconduct and thereby produced the injuries of which he complains. An allegation in the complaint in this count charges:

"That while said automobile was on defendant's track, as aforesaid, and while the said *William Lotharius* was in the exercise of due care hurriedly examining and adjusting parts of the machinery to remove, if he could, the cause that made such automobile suddenly and unexpectedly stop, as aforesaid, and while he, the said plaintiff, was standing close to said automobile on the west side thereof, near the east rail of the defendant's west track facing in a southeasterly direction, and while he, with his left hand, was adjusting or trying to adjust parts of the machine to remove the cause of such sudden stop, and while the plaintiff was in plain view for a distance of several blocks north of the point where he was standing, and so near the west track of said defendant company that a street car thereon could not pass him without striking or colliding with him, one of the defendant's street railway cars in charge and in the care and management of the motorman and conductor of the defendant company, on said car, recklessly, wantonly and with gross and utter disregard of human life, ran at a grossly negligent, dangerous and excessive rate of speed on said west track coming from the north, and without any notice or warning of its approach to plaintiff, did with great force strike and collide with said plaintiff near the east rail of said west track, throwing him a great distance in a southerly direction, seriously and permanently injuring him as herein more fully stated; that the said servants of said defendant company before they reached the place where said disabled automobile was standing, and where said plaintiff on the west side of said automobile was standing trying to repair the same and within a sufficient distance where they could have stopped said car or slowed the same down to avoid injury, discovered the fact that said plaintiff was on the west side of said automobile so near the east rail of the west track that such street car could not possibly pass him without seriously injuring or killing him, and said servants saw, or ought to have seen, that he, the said plaintiff, was in great and imminent peril of being injured or killed,

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and that such servants had ample time to stop said car before reaching the plaintiff after so discovering him, and had ample time to slow down said car and give warning to the plaintiff so he might avoid the great and imminent danger he was in, but that they, the said servants, and each of them, made no attempt to stop said car or to slow the same down to avoid injury, but wantonly, recklessly and with a gross and utter disregard of the plaintiff's peril and danger, continued said high rate of speed without giving any warning whatever, causing the injury to the plaintiff as herein set forth."

The defendant demurred to both causes of action set forth in the complaint. The court sustained the demurrer to the first count charging that the defendant was guilty of ordinary negligence which proximately caused the plaintiff's injuries, upon the ground that the plaintiff was barred from recovery on this alleged cause of action because it appeared from the facts stated that the plaintiff was guilty of negligence which proximately contributed to produce his injuries. The court held that the second count stated a good cause of action for gross negligence amounting to wilful misconduct, and overruled the demurrer interposed thereto.

Both parties appealed from the order of the court.

The cause was submitted for the plaintiff on the brief of *Albert M. Kelly,* attorney, and *Schmitz, Wild & Gross,* of counsel, and for the defendant on that of *Van Dyke, Rosecrantz, Shaw & Van Dyke.*

SIEBECKER, J. Upon the plaintiff's appeal the question is, Do the facts alleged in the complaint show that the plaintiff cannot recover on the first count, charging the defendant's servants with being guilty of ordinary negligence in running the street car which collided with the plaintiff and caused him personal injury? The complaint states the facts of the alleged collision of the street car and the position and conduct of the plaintiff at the time of the accident with sufficient particularity to show the situation and his conduct in

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the transaction that led to the happening of the accident upon which liability is asserted. From these allegations it appears that the plaintiff's automobile stopped when it was over the east street-car track and in such close proximity to the west track that if he stood on the west side of his automobile an approaching street car must collide with him. It also appears that this was obvious and known to him and that he had an unobstructed view of the surrounding conditions. It is alleged that the said "tracks of the street railway, at the point where the said automobile stopped, were straight for a long distance both north and south of said automobile," and "that he could at any moment have observed approaching cars from either direction." It is undisputed that the plaintiff was fully aware that the street cars were then running on these tracks, and that a glance to the north or south, while standing in this dangerous position, would have informed him of the approach of any street car and enabled him to step out of the course of the car and thus have avoided the danger. The facts alleged clearly show that the plaintiff stepped into this dangerous place, knowing that a street car could not pass without colliding with him; that if he had momentarily glanced to the north and south he could have observed approaching cars; and that under the circumstances there was nothing to prevent him from stepping aside into a place of safety and avoiding a passing car. From such conduct on his part but one reasonable inference can follow, namely, that he omitted to exercise the care that ordinarily prudent persons, under similar circumstances, would exercise for their safety; and there can be no question but that the plaintiff's conduct in this regard proximately contributed to cause the injuries of which he complains in this action. We are convinced that the trial court properly sustained the demurrer to the alleged cause of action in the first count of the complaint.

The only point made by the defendant on its appeal from the order is that the court, in its order overruling the defend-

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ant's demurrer to the second cause of action, erroneously ordered "that the said plaintiff have judgment thereon, but with leave to the defendant to answer." It is asserted that if the defendant does not answer in the case this order permits the plaintiff to have judgment in his favor on his complaint without proving his case by satisfactory evidence. We do not consider that this interpretation of the order is correct. The meaning of the phraseology of the order must be ascertained in the light of the case as it stands upon the pleadings after the demurrer drops out. If the defendant fails to answer, then the plaintiff is of course entitled to judgment on his second cause of action alleged in the complaint according to law, which in this case means after making due proof of the alleged cause of action. *Hyman v. Susemihl,* 137 Wis. 296, 118 N. W. 837.

By the Court.—The order is affirmed on both appeals.

WILDES, Appellant, vs. FRANKE, Respondent.

April 9—May 1, 1914.

Appealable orders: Vacating judgment: Milwaukee civil court.

1. **There can be no appeal to the supreme court except as authorized by statute.**
2. **An order of the circuit court affirming an order of the civil court of Milwaukee county vacating a judgment of the latter court immediately after its entry, is not appealable under sec. 3069, Stats. 1913.**
3. **Whether such order of the civil court was appealable to the circuit court, not determined.]**

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Dismissed.*

The appeal is from an order of the circuit court, which order affirmed an order of the civil court of Milwaukee county vacating a default judgment of the latter court.

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C. H. Hamilton, for the appellant.

For the respondent there was a brief by *Wheeler & Witte,* and oral argument by *Lyman Wheeler.*

TIMLIN, J. Where no statute authorizes an appeal to this court there can be no appeal. *Puffer v. Welch,* 141 Wis. 304, 124 N. W. 406. The circuit court orders which are appealable to this court are specified in sec. 3069, Stats. 1913, and the order here appealed from is not there mentioned. This order is not properly described as a final order of the circuit court upon a summary application in an action after judgment, nor as an order granting a new trial. If the order of the civil court could be considered final, an appeal would lie from that order to the circuit court. Ch. 549, Laws of 1909, as amended by sec. 20, ch. 425, Laws of 1911; sec. 3069, *supra; Port Huron E. & T. Co. v. Rude,* 101 Wis. 324, 77 N. W. 177; *Ledebuhr v. Grand Grove,* 97 Wis. 341, 72 N. W. 884.

But whether or not the order was appealable from civil court to circuit court is a question not within our jurisdiction to determine on this appeal, if this appeal is unauthorized. *Wisconsin R. E. Co. v. Milwaukee,* 151 Wis. 198, 138 N. W. 642. No lack of jurisdiction on the part of the civil court to vacate the judgment is asserted. If the circuit court erred in affirming the order of the civil court instead of dismissing the appeal to that court, that would not be a prejudicial error, but, as said before, the question is not before us. An order of the circuit court granting a new trial in a case appealed from the civil to the circuit court has been held appealable to this court because sec. 3069 expressly gives an appeal to this court from the order of the circuit court granting a new trial. *Hanna v. C., M. & St. P. R. Co.* 156 Wis. 626, 146 N. W. 878. So an order of the circuit court affirming an order of the civil court overruling a demurrer has for a similar reason been held appealable. *Danielson v. Garage E. M*

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Co. 151 Wis. 492, 139 N. W. 443. But the order of the circuit court here appealed from is clearly not appealable because not one described in sec. 3069, *supra.*

It is the policy of the law that every suitor shall have a hearing, but not several hearings, particularly on matters of procedure. Public interest requires that there be a speedy end to litigation and fewer dilatory appeals. So there is fundamental reason for limiting the words of sec. 3069, *supra,* to exclude an appeal from an order like this, not expressly described therein. The result is that an order of the circuit court affirming an order of the civil court vacating a judgment of the latter court immediately after its entry is not appealable to this court.

By the Court.—Appeal dismissed.

WALCZAKOWSKI, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

April 10—May 1, 1914.

Street railways: Injury to passenger: Negligence: Special verdict: Inconsistency: Liability: Cause of accident not established: Instructions to jury: Harmless errors: Reinstructing jury: Absence of counsel.

1. Where, in an action for injuries sustained in alighting from a street car, plaintiff's claim was that the car suddenly started forward with a jerk and threw him off, and defendant claimed that the injury was the result of a voluntary attempt to alight while the car was in motion, findings by the jury negativing both such claims were not inconsistent.
2. Plaintiff, having in such case failed to show that defendant was negligent as claimed, was not entitled to recover; and it was not necessary, in order to sustain a judgment for defendant, that the true cause of the accident should be established. *Samulski v. Menasha P. Co.* 147 Wis. 285, distinguished.
3. Error, if any, in an instruction as to the place at which plaintiff had a right to have the car stopped was not prejudicial, because

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such instruction had no bearing on the finding that the car did not start forward with a sudden jerk.

4. Where counsel voluntarily leave court after the jury has been sent out to deliberate upon their verdict, the judge is under no obligation either to send or to wait for them before reinstructing the jury or receiving their verdict; but if their attendance can be procured without unreasonable delay, it is better practice to do so.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action for personal injury. On August 31, 1912, plaintiff was riding on a car of the defendant, and he claims that, as he stood on the step ready to alight, the car suddenly started forward with a jerk and threw him off. The defendant claims that plaintiff voluntarily alighted while the car was in motion and thus sustained his injuries. The jury found (1) that plaintiff was not injured as a result of his attempting to alight from the car while it was in motion; (2) that the car was not suddenly jerked in such a manner as to cause the plaintiff to be thrown to the pavement; (3) that no want of ordinary care on the part of the plaintiff proximately contributed to produce his injury; and (4) that plaintiff sustained damages in the sum of $1,550. Judgment in favor of the defendant was entered upon the special verdict, and plaintiff appealed.

For the appellant the cause was submitted on the brief of *Schmitz, Wild & Gross* and *Peterson & Jackowska-Peterson.*

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *J. D. Shaw.*

VINJE, J. Plaintiff claimed that he rang the bell notifying the motorman that he desired to alight at the next regular stopping place, and that preparatory to getting off he walked to the steps of the car and stood there holding on to the side-bars ready to alight when the car should come to a full stop; that the car slowed up, but instead of coming to a

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stop it started forward with a sudden jerk and threw him off. The defendant's contention was that plaintiff voluntarily attempted to alight while the car was in motion and received his injury as a result thereof. The jury found against both claims. It is urged that such findings are inconsistent. This would be so if the only possible ways of falling from a moving car were either by reason of a sudden jerk of the car or by voluntarily attempting to get off. There are other ways, however, and the jury evidently thought so when answering questions 1 and 2. The answer to question 2 defeated plaintiff's right to recover, since it negatived negligence on the part of the defendant. Such answer is sustained by evidence. This is not a case, as plaintiff seems to think, where it is necessary, in order to sustain the judgment entered, to establish the true cause of the accident, for there is no recovery adjudged upon the verdict. Plaintiff fails to establish liability because the jury found the evidence did not show that defendant was negligent in the manner claimed. Cases, therefore, like *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142, where there was a recovery, cited to the effect that verdicts must rest upon probabilities and not bare possibilities, have no application.

There was some conflict or confusion in the evidence as to whether or not plaintiff rang the bell in time to have the car stopped at Ninth avenue or at Tenth avenue, and the court, upon the question of plaintiff's contributory negligence, charged the jury:

"In connection with this question you are instructed that the plaintiff as a passenger had no right to demand that the car should be, or expect that it would be, stopped to let him off, excepting when the car reached its regular stopping place, namely, at the end of the block."

It is claimed by plaintiff that this instruction is erroneous because there was evidence to show the regular stopping place was at the beginning and not at the end of the block, and

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though given relative to the question of contributory negligence, which was found in favor of plaintiff, it had such a general bearing upon the entire case that the jury must have had it in mind in answering the other questions. Assuming, but not deciding, that it was erroneous, we cannot perceive what possible connection it had with, or bearing upon, question number 2, which found the car did not start forward with a sudden jerk. This was the only question resolved adversely to plaintiff. If it did not affect the answer to this question, as we hold it did not, plaintiff was not harmed by it even if erroneous.

The contention that the court erred in reinstructing the jury upon their request because the clerk's minutes do not show that court was in session or open, but merely that the "jury returned into court," though such return into court was as late as 11:10 p. m., is too trivial for serious discussion.

Counsel for plaintiff were not present when the jury was reinstructed. No duty devolved upon the court to send for them or wait their return. If counsel voluntarily absent themselves from court after the jury has been sent out to deliberate upon their verdict, the court is under no obligation to either send or wait for them before reinstructing the jury or receiving their verdict. Such a rule would in many cases seriously and needlessly hamper trial judges in the discharge of their duties. Where, however, their attendance can be procured without unreasonable delay, it is better practice to do so. *Meier v. Morgan,* 82 Wis. 289, 52 N. W. 174; *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666.

By the Court.—Judgment affirmed.

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JAHN, Respondent, vs. NORTHWESTERN LITHOGRAPHING COMPANY, Appellant.

April 10—May 1, 1914.

Master and servant: Injury: Unsafe working place: Proximate cause: Contributory negligence: Questions for jury: Special verdict: Form: Harmless errors: Excessive damages.

1. Plaintiff, the engineer in charge of a gas engine, was injured by a back-fire as he stood or was passing about four feet from the open end of the air intake pipe which had been temporarily lowered to about the level of his head while a new gas producer was being tested. Upon the evidence it is *held* that it was for the jury to say whether defendant failed to perform the duties imposed by sec. 2394—48, Stats. 1911, as to safety of the working place, whether such failure proximately caused the injury, and (the defense of assumption of risk having been abolished) whether plaintiff was guilty of any affirmative act constituting contributory negligence.
2. Error, if any, in that a question in the special verdict assumed that defendant permitted the intake pipe to remain temporarily where it was, was not prejudicial, it being undisputed that defendant permitted plaintiff to work about the open pipe in violation of said sec. 2394—48, and the jury having found that this fact proximately caused the injury.
3. An award of $2,500 for serious injury to the eyes of a stationary engineer is *held* not excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action for personal injuries received by plaintiff while in defendant's employ, November 18, 1911. The plaintiff was a stationary engineer and had been for some years in charge of the gas engine used in the appellant's lithographing establishment, which was operated by gas from the city gas mains. Prior to the day of the accident the Luick-Bassett Company had been installing, under contract with the defendant, a gas-producer outfit in the works, which was expected to produce from coal the necessary gas to run the engine. The air intake pipe of the engine (a horizontal pipe four inches in

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diameter) had always been about eighteen inches above the head of an average man in the engine room. This pipe is the pipe through which air is taken for the purpose of making the proper mixture of gas and air. When the gas producer had been installed and it became necessary to connect it with the engine and test the capability of the producer (which operation was a part of the duty of the Luick-Bassett Company), the employees of that company lowered this pipe about eighteen inches. This lowering was done during the noon hour of the day of the accident. The intention was to run the end of this pipe outdoors when it was demonstrated that the producer would furnish gas for the successful operation of the engine. It was plaintiff's duty to be present when the test was being made for the purpose of starting the engine when the contractors wanted it started. When the plaintiff came to work in the afternoon he noticed the change in the intake pipe, and testifies that he spoke to the defendant's manager about it and said that it was in a dangerous position, and that the manager told him that the pipe was only temporarily there during the test, and after the test would be extended outdoors. The danger consisted in the possibility that the engine might back-fire, in which case gas and flame would be expelled from the pipe so violently as to seriously injure any one whose head happened to be in front of the pipe. The plaintiff knew that back-firing sometimes happened and was conscious of the danger. His testimony that he told the manager of the danger is denied by the manager and by other witnesses. After the starting of the engine plaintiff noticed that the cover on the mixing valve was jumping up and down and knew that this would probably cause an imperfect mixture of gas and air and was likely to result in back-firing. The plaintiff testified that after the engine started he started to go to the switchboard to put on the main switch from the dynamo and that the manager spoke to him and asked him to throw some more load on the engine; that

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he stopped when the manager spoke to him and stood for a moment or two talking to the manager, his head being about four feet in front of the open intake pipe when the back-fire occurred, seriously injuring his eyes. The manager denied that he stopped the plaintiff or spoke to him before the injury. In any event it is undisputed that the engine back-fired as the plaintiff was passing the pipe and that the injury resulted therefrom.

The jury returned a special verdict as follows:

"(1) Did the defendant company on November 18, 1911, negligently cause a sudden and unexpected back-fire from the intake pipe? *A.* No.

"(2) Was the plaintiff required, in obedience to any orders of the defendant, to be opposite to the intake pipe at the time he was injured? *A.* Yes.

"(3) Did the defendant, the *Northwestern Lithographing Company,* fail to exercise ordinary care in permitting the Luick & Bassett Producer Company to continue temporarily the location and termination of the air intake pipe at the place where it was located and terminated at the time of the plaintiff's injury? *A.* Yes.

"(4) If you answer the third question 'No,' you need not answer this question; otherwise answer this question: Was such failure to exercise ordinary care on the part of the *Northwestern Lithographing Company* the proximate cause of the injury sustained by the plaintiff, *William Jahn?* *A.* Yes.

"(5) Did any want of ordinary care on the plaintiff's part contribute in any degree to produce the injury? *A.* No.

"(6) If the court should be of the opinion that the plaintiff, *Jahn,* is entitled to recover in this action, what sum will reasonably compensate him for his injuries? *A.* $2,500."

From judgment for the plaintiff on this verdict the defendant appeals.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

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WINSLOW, C. J. The appellant claims that a verdict for the defendant should have been directed because (1) there is no evidence that defendant failed to furnish plaintiff a reasonably safe place to work, or that such failure proximately caused the injury; (2) the plaintiff was guilty of contributory negligence as matter of law. These contentions will be briefly considered.

1. It is admitted that it was plaintiff's duty to be present to operate the engine at the time of the accident. Under sec. 2394—48, Stats. 1911, the defendant was required to furnish the plaintiff a safe place of employment and also not to permit or suffer him to go or be in any employment or place of employment which was not safe. Whether the defendant failed in the performance of these duties, and, if so, whether such failure was the proximate cause of the plaintiff's injury, were clearly questions for the jury.

2. Probably, under his own evidence, the plaintiff assumed the risk of the back-firing of the engine, because he knew of the change in the pipe and called the attention of his superior to the fact, but this defense was abolished by sec. 2394—1, Stats. 1911, and it does not appear as matter of law that the plaintiff was guilty of any affirmative act which could properly be called contributory negligence. Whether he was so guilty was properly a jury question.

3. The appellant objects to the form of the third question because it assumes without proof that the defendant company permitted the intake pipe to remain temporarily where it was. It is undisputed, however, that the defendant permitted the plaintiff to work about the open pipe in violation of the statutory provision hereinbefore cited, and it is found by the answer to the fourth question in effect that this fact proximately caused the plaintiff's injury, hence the error, if any, was not prejudicial.

4. We do not regard the claim that the damages are excessive as well founded.

By the Court.—Judgment affirmed.

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ANDERSON, Respondent, vs. FIREMEN RELIEF ASSOCIATION OF THE CITY OF MILWAUKEE, Appellant.

April 10—May 1, 1914.

Firemen relief association: Membership and beneficiary rights: Forfeiture: Insanity of member.

1. Under sec. 1987, Stats., and sec. 3, art. XI, of the articles of association of the Firemen Relief Association of the City of Milwaukee, the mere fact that a member of that association ceased to be an active member of the fire department of the city did not operate to cancel his certificate of membership or forfeit the beneficiary rights so long as his name remained on the rolls as that of a member in good standing.

[2. Whether a member of the fire department of the city of Milwaukee—in this case one whose particular duty was to attend to the boiler on a fire boat—was an officer whose office became vacant under sec. 962, Stats., when he was adjudged insane, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover on a beneficiary right. The facts as found are these:

1. Plaintiff is the widow of Robert J. Anderson.

2. Defendant is a corporation organized under the laws of this state.

3. Plaintiff's deceased husband became a member of the fire department of the city of Milwaukee May 17, 1904. He duly qualified as such and as a city officer under the charter of the city, and continued in his position until he died, unless he lost his place by operation of law. He showed symptoms of mental impairment for some time prior to March 13, 1912. On such day, while going from his place of work to his home, he became violently insane. March 19th thereafter he was, in due form, adjudged insane and placed under restraint. Soon thereafter he became afflicted with blood poisoning. That hastened his death which occurred April 27, 1912. His particular work as a fireman was to attend to the furnace on a fire boat.

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4. Mr. Anderson became a member of defendant December 1, 1904, and remained such in good standing until his death.

5. By defendant's organic act it is liable to the widow of a deceased member, in case of there being such, in the sum of $1,500, contingent upon his dying while in good standing as such member.

6. Mr. Anderson satisfied all the conditions of the liability aforesaid.

7. Plaintiff complied with all conditions precedent to her right to realize on her beneficiary right.

On such facts judgment was awarded plaintiff for $1,500.

For the appellant there were briefs by *Thos. H. Dorr,* attorney, and *H. K. Curtis,* of counsel, and oral argument by *Mr. Dorr.*

F. H. Gugel, for the respondent.

MARSHALL, J. The liability of defendant must be tested by sec. 1987, Stats. It is a corporation existing thereunder. That with the articles of association and by-laws made in conformity thereto constitute the measure of its power and responsibilities.

The constitution of appellant, existing as stated, provided as to members of the class to which respondent's husband belonged, viz. one whose membership commenced subsequent to the 1st day of May, 1899, as follows: they "shall not be entitled to any advantages and benefits of such association from and after the time they cease to be active members of the police or fire department." That is a part of sec. 1987 aforesaid. Sec. 1, art. IX, of the articles of association provided for payment of $1,500 to the beneficiary of a deceased member upon condition of his being in good standing at the time of his death and the required proof being made.

The trial court found that the two provisions of appellant's constitution mentioned were satisfied. Appellant's counsel

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challenges that upon the ground that the membership of the assured ceased upon his being adjudged insane, basing that on sec. 1, ch. II, of the Milwaukee charter, making members of the fire department officers, and sec. 962 of the Statutes which provides that every office shall become vacant in the event of the incumbent being duly adjudged insane.

Possibly the trial court overlooked the fact that sec. 1, art. IX, of defendant's articles of association does not constitute the sole test of whether a person circumstanced as respondent is, has a valid claim against appellant. The legislation as it existed when such article was adopted, was later amended by ch. 145, Laws of 1899, so as to provide that

"In case any member of such association shall cease to act with the fire or police department of which he has been a member, after five years of service, he shall continue to enjoy all the advantages and benefits of the association as long as he complies with the rules, regulations and by-laws of the same and pays his dues, unless the connection of such person with either of said departments was discontinued for the good of the service, provided that all persons becoming members of such association on and after the first day of May, 1899, shall not be entitled to any of the advantages and benefits of said association from and after the time when they cease to be active members of the police or fire department. . . ."

Respondent's husband belonged to the special class mentioned. Pursuant to the amended act appellant adopted sec. 3, art. XI, of its charter, which provides that

"Whenever any member of this association shall cease, for any reason, to be an active member of the fire department of the city of Milwaukee, he shall cease to be a member of this, *The Firemen Relief Association of the City of Milwaukee, and his name shall be stricken from the rolls, and he shall thereby* forfeit all claim to membership, and his membership certificate canceled and shall be void, and neither he nor his beneficiaries shall have any claim against said association for relief moneys in any manner, and said association shall in no manner be liable to any person or persons whomsoever there-

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after; provided, that the provisions of this section shall not apply to those who became members of this association before May 1, 1899."

Thus it will be observed that the law treats members of the fire department in active service, who became such members after the 1st day of May, 1899, as in a class by themselves. As to them active service is a condition of the member's "advantages and benefits of such association." The condition of inactivity acts automatically upon the member's "advantages and benefits of the association." But does that cut off the rights of his beneficiary so long as the member, though excusably inactive, remains such, keeping up his dues as provided in sec. 1, art. X, and his name is still carried on the rolls? It does not seem so. The law does not so expressly provide. It will fairly admit of a different construction in harmony with our view of sec. 3, art. XI, of appellant's charter. A construction which would cut off the beneficiary in case of cessation of active service by sickness, would make rights of that character contingent upon death while actively, in the strict meaning of the law, in service.

It seems that the association observed some ambiguity in respect to whether mere inactivity of a member would be fatal to the rights of his beneficiary, though his name still remained on the rolls and he was a member in good standing, preserving the beneficiary's right under the terms of sec. 1, art. IX; so sec. 3, art. XI, was adopted, under which forfeiture of membership, cancellation of membership certificate, and forfeiture of beneficiary rights, does not occur automatically upon the person ceasing to be an active member of the fire department. Operation of this clause waits upon the name of the member being "stricken from the rolls" of the association. The language is peculiar but plain. "He shall cease to be a member of this, *The Firemen Relief Association of the City of Milwaukee, and his name shall be stricken from the rolls and he shall thereby forfeit,*" etc., and

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"neither he nor his beneficiary shall have any claim," etc. The article contemplates some action on the part of the association before forfeiture of membership and beneficiary rights occurs.

In view of the foregoing, whether respondent's husband was an officer whose place became vacant by the adjudication of insanity as claimed by appellant, is immaterial. It did not operate to cancel the certificate of membership in appellant association and forfeit the beneficiary right, so long as Anderson's name remained on the rolls as that of a member in good standing. It so remained up to the time of his death and the rights of respondent then became fixed beyond power of disturbance by any act of appellant. Therefore, the judgment must be affirmed.

By the Court.—It is so ordered.

BESNYS, Appellant, vs. HERMAN ZOHRLAUT LEATHER COMPANY, Respondent.

April 10—May 1, 1914.

Master and servant: Injury from unsafe machinery: Insufficient guard: Contributory negligence: Methods permitted by employer: Questions for jury.

1. The duty imposed upon an employer by sec. 1636*j* and secs. 2394—41 to 2394—71, Stats. 1911, is that the place and the method of carrying on the business in which he is engaged shall be as safe as the nature thereof will reasonably permit as regards safety devices and safeguards, reasonably adequate methods and processes, and any other thing reasonably necessary to protect the life, health, safety, and welfare of the employee, and not to require, permit, or suffer an employee to go or be in any employment or place of employment which is not as safe as the nature of the employment will reasonably permit.
2. Where an employee in a tannery, working at an unhairing machine, lost his hand as the result of reaching over a wire guard

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or lattice attached to the machine and extending from ten to fourteen inches above the hide, for the purpose of adjusting the hide on the bolster, thereby bringing his hand in contact with a revolving knife cylinder, and it was stipulated upon the trial that such machine might have had an additional guard of chicken wire so attached that a person could not reach over and put his hand within the danger zone, it could not be held as a matter of law that the employer had complied with all his statutory duties.

3. The defense of contributory negligence, though afterwards taken away, was available to an employer under secs. 2394—41 to 2394—71, Stats. 1911.

4. The penalty imposed by sec. 2394—70, Stats. 1911, upon any person who should violate the provisions of, or do any of the acts prohibited in, secs. 2394—41 to 2394—71, was in the nature of a forfeiture, the purpose of which was merely to enforce compliance with the statute, and, although it was to be paid into the state treasury, did not make the acts criminal in their character and did not preclude the defense of contributory negligence in actions for personal injuries based upon noncompliance with the statute.

5. The legislative purpose expressed in secs. 2394—48, 2394—49, Stats. 1911, was to impose upon the employer a liability for all injuries resulting from the hazards, risks, and dangers incident to the methods, processes, and conditions of the business furnished, permitted, or suffered by him, however obvious or open such hazards, risks, and dangers might be to the employee.

6. Since the evidence in this case permitted the inference that plaintiff pursued the customary method and process of operating the machine at which he was working, when he reached over the guard to adjust the hide on the bolster, it could not be held as matter of law that he was guilty of contributory negligence.

BARNES, J., and WINSLOW, C. J., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This is an appeal from a judgment of nonsuit. The plaintiff brought this action to recover damages for the injuries he sustained [on October 2, 1911] from the loss of a part of his left arm, in consequence of coming in contact with the knives on the cylinder of a Leidgen unhairing machine which he was operating in the defendant's tannery. This is a power-driven machine having a revolving knife cylinder

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about eight inches in diameter which travels backward and forward over the hide, which is placed over a rubber bolster or plat. It is operated by a lever in control of the person employed to operate it to remove the hair from hides in conducting the tannery business. The hide is thrown on the rubber bolster, which slants downward at an angle of forty-five degrees, and is about five feet wide, fastened at the top to a wooden beam by a cleat and at the bottom to a board, and kept in tension by counter weights. The knife cylinder is carried by an arm at each end, to which is attached the mechanism which causes it to operate. It has a range of motion from a point about four feet above the top of the bolster and along the course of the bolster to the bottom.

The guarding device on the machine at the time of this accident consisted of a wooden piece two by six inches, which reached across the beam of the bolster at the upper end. To this was attached a wire lattice which ran to a wooden cross-piece one by two inches. This formed the upper edge of the guard. The three parts made the guard from ten to fourteen inches above the hide, which rested on the upper end of the bolster. The hides were spread on the bolster when the knife cylinder and clamp and guard were raised to their highest and a stationary point. After the hides had been so placed, the operator by means of a lever brought the clamp and guard and knife cylinder down to the upper end of the bolster, thereby clamping the hides to the bolster and starting the knife cylinder to revolving and to removing the hair. The knife cylinder revolved rapidly, scraping the hair from the hide as it moved down the bolster. The operator, by means of a lever which extended through the frame at the back of the bolster and under the guard, controlled the up and down movements of the knife cylinder on the hide for the purpose of removing whatever hair remained on part of the hide on the bolster after the knife cylinder had passed over it.

It appears that the plaintiff was employed as an operator

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of this machine; that he had worked running this kind of a machine for a year in Red Wing, Minnesota; and that he fully understood its operation and how to run it. He had worked on this machine for the defendant for five weeks before the day of this accident. On the day of the accident, after having been at work for two hours in the morning unhairing hides, and while engaged in the operation of unhairing a hide on the bolster, he proceeded to put a part of the hide onto the bolster, from which the hair had not been removed, so as to place these parts within the area of the running knife cylinder, by reaching over the guard and pulling the hide into place for this purpose. In his description of this process he testifies that he had his right hand on the lever controlling the knife cylinder and his left hand resting on the upper cross-piece of the guard; that he observed a part of the hide was beyond the course of the knife cylinder and needed to be put within the field of its operation; that he reached over the guard to pull it up on the bolster so that the knives could act on the parts of the hide from which the hair had not been removed; that when he grasped the hide to pull it up, the knife cylinder was on the lower part of the bolster; that it started towards the top and caught the mitten on his left hand and drew his hand into contact with the revolving knives and cut it so as to necessitate amputation.

Upon the plaintiff's evidence the trial court held that: "In this case there is no testimony tending to explain or excuse, as a matter of law, the act of the plaintiff in deliberately putting his left hand into the zone of danger. His conduct in that regard constitutes a want of ordinary care proximately contributing to his injury."

The court awarded judgment dismissing the plaintiff's complaint.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.* They argued, among other things,

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that inattention, forgetfulness, absent-mindedness, indifference, inadvertence, failure to recollect, and the like, being universal weaknesses, common in a great measure to the mass of mankind, are never, as a matter of law, contributory negligence; but merely make in each particular case a question of contributory negligence for the jury. *Kane v. N. C. R. Co.* 128 U. S. 91, 9 Sup. Ct. 16, 32 L. ed. 339; *West v. Eau Claire,* 89 Wis. 31, 36, 61 N. W. 313; *Murphy v. Herold Co.* 137 Wis. 609, 615, 119 N. W. 294; *Wheeler v. Westport,* 30 Wis. 392, 394; *Dorsey v. Phillips & C. C. Co.* 42 Wis. 583, 599; *Doan v. Willow Springs,* 101 Wis. 112, 116, 76 N. W. 1104; *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 619, 129 N. W. 664; *Moyer v. Oshkosh,* 151 Wis. 586, 598, 139 N. W. 378; *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273, 276, 58 N. W. 408; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622, 623, 66 N. W. 791; *S. C.* 97 Wis. 641, 73 N. W. 563. There was in this case an element of haste or being "kept on the jump," which is an additional circumstance to be given weight by a jury on the question of contributory negligence. *West v. Bayfield M. Co.* 144 Wis. 106, 112, 128 N. W. 992; *Hanson v. N. P. R. Co.* 108 Minn. 94, 121 N. W. 607; *Tay v. W. & S. F. R. Co.* 100 Minn. 131, 110 N. W. 433; *Kreuzer v. G. N. R. Co.* 83 Minn. 385, 86 N. W. 413, 414; *Anderson v. G. N. R. Co.* 74 Minn. 432, 77 N. W. 240; *Larson v. Johnson,* 72 Minn. 441, 75 N. W. 699; *Blomquist v. G. N. R. Co.* 65 Minn. 69, 67 N. W. 804.

For the respondent there was a brief by *Williams & Stern,* and oral argument by *Burdette Williams.* They contended, *inter alia,* that plaintiff's duties did not take him within the danger zone, but he went out of his way to do a perilous thing in an unnecessarily and obviously dangerous way, hence there was no violation of statutory duty by the master, but plaintiff was guilty of contributory negligence. They cited *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142; *Rosholt v.*

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Worden-Allen Co. 155 Wis. 168, 144 N. W. 650; *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *Houg v. Girard L. Co.* 144 Wis. 337, 129 N. W. 633; *Gulland v. Northern C. & D. Co.* 147 Wis. 391, 132 N. W. 755; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513; *Dixon v. Russell,* 156 Wis. 161, 145 N. W. 761; *Blahnik v. Central C. Co.* 142 Wis. 167, 125 N. W. 317; *Montevilla v. Northern F. Co.* 153 Wis. 292, 141 N. W. 279; *Strosin v. Wis. River P. & P. Co.* 153 Wis. 409, 141 N. W. 243; *Thompson v. American W. P. Co.* 143 Wis. 598, 128 N. W. 277; *Goodrich v. Chippewa Valley E. R. Co.* 108 Wis. 329, 84 N. W. 419; *Writt v. Girard L. Co.* 91 Wis. 496, 65 N. W. 173; *Chicago G. W. R. Co. v. Crotty,* 141 Fed. 913.

SIEBECKER, J. The case presents for consideration to this court the questions: 1st. Does the evidence present a case wherein the defendant required or permitted or suffered the plaintiff to go or be in an employment or place of employment which was not safe by reason of failing "to furnish, provide and use safety devices and safeguards and to use such methods and processes reasonably adequate to render such employment and place of employment safe," and "do every other thing reasonably necessary to protect the life, health, safety or welfare" of the plaintiff? Secs. 2394—48, 2394—49. 2d. If the defendant failed in its duty toward the plaintiff imposed on it by law, then can it avail itself of the defense of contributory negligence? And 3d. Do the facts and circumstances shown by the evidence establish that the plaintiff was guilty of contributory negligence as a matter of law as determined by the trial court?

It is contended by the defendant that the judgment of dismissal of the plaintiff's complaint can be sustained upon the ground that the evidence does not show that the defendant failed to perform any legal duty it owed the plaintiff under

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either the provisions of sec. 1636*j* or secs. 2394—41 to 2394—71 inclusive, or under all of these statutes taken together.

It is argued that the guard provided, as described in the foregoing statement, was in compliance with the demands of these statutes, and hence no default of the defendant exists in this regard. Treating the case as within the foregoing statutes, it is manifest the duty imposed on the defendant is that the place and the method of carrying on the process of manufacture in which the defendant is engaged shall be as safe as the nature thereof will reasonably permit as regards safety devices and safeguards, reasonably adequate methods and processes, and any other thing reasonably necessary to protect the life, health, safety, and welfare of the employee; nor shall the employer require, permit, or suffer an employee to go or be in any employment or place of employment which is not as safe as the nature thereof will reasonably permit. *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650; *Langos v. Menasha P. Co.* 156 Wis. 418, 145 N. W. 1081. Considering this case in the light of these duties, can it be said as a matter of law that the defendant performed its duties in these respects as imposed by the statutes? Does it appear that the defendant furnished a guard and safety attachment to this machine which met the requirements of the law? We find stipulated facts in the case to the effect that "the machine on which the accident occurred might have had a guard of chicken wire placed across the arm which carries the gate or fastener, as it is called, so that a person could not reach over that gate and put his hand down onto the rubber plat while the gate or fastener was down, clamping the hide in position for work, and that he could not put his arm over the gate in such a manner as to get it in contact with the knife cylinder if there had been wire across the top. . . ." This tends to show pretty clearly that the guard provided was not as safe as the nature of the employment would reasonably permit. It is manifest that the

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court could not properly hold as a matter of law that the defendant had complied with all its legal duties imposed by the statutes. The language used in the case of *Willette v. Rhinelander P. Co.* 145 Wis. 537, 554, 130 N. W. 853, in speaking of similar statutory duties imposed by sec. 1636*j*, Stats., applies to the situation presented here:

"The intent of the statute is that if an employer maintains a situation within it, which as an ordinarily prudent man he ought reasonably to apprehend may cause a personal injury to any of his employees in the discharge of his duty, he must hold himself responsible for the consequences proximately produced thereby to any such employee without his contributory negligence. . . . It is no defense or excuse as regards civil remedies that it is not practicable to guard against the danger or to efficiently do so without some particular instrumentality, as in this case a ladder."

It is contended by the plaintiff that the court erred in holding that the defense of contributory negligence is available under secs. 2394—41 to 2394—71, regulating the rights of the parties to this action. The original provisions of sec. 2394—1, embodied in ch. 50, Laws of 1911, abolished the defense of assumption of the risk and also that of negligence of fellow-servants where four or more servants were employed in a common employment, in all actions to recover damages for personal injury sustained by an employee while engaged in the line of his duty. Under this statute the defense of contributory negligence has been held open to employers in the courts without being questioned by the parties in many actions governed by the provisions of these chapters which provide for workmen's compensation, an industrial commission, and for safe conditions of employment. It is also significant that the legislature, in the next following session, amended these statutes by expressly enacting that it shall not be a defense in actions within the scope of the statute "that the injury or death was caused in whole or in part by the want of ordinary care of the injured employee, where such want of ordinary care was not

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wilful." It is manifest from this legislative action that the legislature considered this defense was available to the employer under the original act. But it is argued that the penalty features of the act make this defense unavailable upon the ground that the omission of any duty imposed thereby is declared an offense in the law. An examination of the provisions of the act discloses that a penalty is imposed by sec. 2394—70. It provides that every employer, employee, or other person who shall violate any of the provisions or do any act prohibited in secs. 2394—41 to 2394—71, inclusive, or fail in any duty lawfully enjoined, or neglect or refuse to obey an order by the commission or any judgment of a court rendered in connection therewith, shall "for each such violation, failure or refusal, . . . forfeit and pay into the state treasury a sum not less than ten dollars nor more than one hundred dollars for each such offense." Tested by context, subject matter, and object of the provisions of the statute, it is apparent that the regulations deal wholly with the civil rights of the persons embraced within its scope and pertain to the right of recovery for an injury occasioned by negligence or wilful omission to perform the duties enjoined between employer and employee. The forfeitures provided are not a substitute for the liabilities to the injured persons by the party in default; they are imposed by way of coercion to enforce performance of the duties imposed by the statute. True, the penalty is to be paid into the state treasury; yet this in itself does not make the acts upon which the penalty follows within the field of criminal conduct nor of the nature of those involved in the cases of *Pizzo v. Wiemann,* 149 Wis. 235, 134 N. W. 899, and *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84. These cases go upon the principle that "When the violation of a statute designed to protect persons against bodily injuries is made a criminal offense, such violations should be classed with gross negligence," and the guilty person held liable for injuries to others, regardless of the contributory neg-

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ligence of the person injured. In the opinion of the court it is stated that the prohibited acts on which liability rested in these cases were of "such grave and serious nature that the legislature declared them to be criminal and subjected the violator to fine and imprisonment, and that the guilty person must be held to have acted wilfully, and hence could not claim exemption from civil liability in damages by reason of any contributory negligence of the injured person." The acts for which a forfeiture are prescribed in the statute here under consideration are not declared criminal nor is a guilty party subject to criminal prosecution. Many of the forfeitures pertain to failure to obey orders of the commission and judgments of courts in civil proceedings. We are persuaded that the legislature did not intend to declare a breach of the duties imposed under these statutes to be a crime and thus make a failure to comply therewith a wilful act in the law, but that the forfeiture imposed was to coerce performance of these duties, and in case of a failure in this respect the guilty person was liable in a civil action for its recovery under sec. 2394—1 *et seq.*, Stats. The legislative intent to leave the defense of contributory negligence open to defendants in actions brought under the original statute is sufficiently clear, and we must so hold. The following cases bear on the question: *Curry v. C. & N. W. R. Co.* 43 Wis. 665; *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *Thompson v. Edward P. Allis Co.* 89 Wis. 523. 62 N. W. 527.

The remaining question is, Did the court err in holding that under the evidence the plaintiff was, as a matter of law, guilty of contributory negligence? A description of the unhairing machine and its method of operation is given in the foregoing statement. It appears that the plaintiff as operator stood near the upper end of the bolster, where the clamp fastened down over the hide on the bolster, with his right hand on the lever which controlled the up and down movements of the knife cylinder, and his left hand on the upper cross-piece of the

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guard, which was from ten to fourteen inches above the hide and came to a point even with his chest,—as stated, "to the second button from the top of his vest." When the cylinder and guard were down, the operator was required to send the knife cylinder up and down the hide to remove the hair. It is urged in support of the trial court's ruling that the evidence shows there was no occasion for the plaintiff to put his hand over the guard or to take hold of any portion of the hide. An examination of the plaintiff's testimony discloses that when he reached over the guard and took hold of the hide, the hair from parts of it had not been removed, and he pulled the hide to put these parts on the bolster; that the cylinder was then revolving near the lower part of the bolster. He also states that he did this because it was customary to do it; that he was so instructed by another workman who likewise operated a machine near him, and that this was done to expedite the work. The trial court evidently concluded that the danger was an obvious one and hence the plaintiff was guilty of affirmative negligence which co-operated with the dangerous condition to injure him. Secs. 2394—48 and 2394—49 clearly impose the duty on the employer to make the place of employment as safe as the nature thereof will reasonably permit, and it also provides that he shall not permit, require, or suffer an employee to go or be in an unsafe employment, and that the methods and processes shall be reasonably adequate to render the place of employment safe. If the jury, upon plaintiff's testimony, believed that the plaintiff was operating the machine and performing his duties in a manner which conformed with the usual and customary method and process of conducting the defendant's business, then the plaintiff was performing his duties in the customary way and was following the methods and processes which his employer directed, permitted, or suffered in conducting its business. If the evidence permitted of this inference, the question is, Was the danger and hazard to which the plaintiff was subjected at the time of the

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injury one created by him through his negligent acts, or was the danger and hazard one incident to the method and process of conducting this business? In answering this question the purpose of the enactments must be consulted. It is manifest from their context that the legislature intended that employers should be liable for all injuries resulting to employees from unsafety in employment as regards to places, safety devices, and safeguards, and to methods and processes of conducting their business. The clear implications are that the risks and hazards of an employment resulting from the failure of the master to comply with these requirements are risks and hazards incident to the employee's duties, though they may be of an obvious nature. The legislature had a right to take into consideration that employees, under the stress and condition of existing industrial life, had but little choice to refuse the employment offered them under such conditions of danger as the employers saw fit to adopt, and deemed it good policy to impose the burden of all the risks and hazards attending such business methods and processes on the employer, though they were open and obvious to an employee in the course of his employment. In harmony with this purpose, the statute inhibits employers from requiring, permitting, or suffering employees to work under conditions of unsafety denounced by its provisions, and also declares that "no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no such employer or other person shall hereafter construct or occupy or maintain any place of employment that is not safe." Sec. 2394—49. We are led to the conclusion that the legislative purpose expressed by these enactments is that the consequent injuries from all hazards, risks, and dangers incident to the method, process, and conditions of the business furnished, permitted, or suffered by an employer, however obvious and open the hazards, risks, and dangers may be to the employee, are to be borne by the employer, and shall

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not defeat a recovery of damages for an injury to an employee engaged in the line of his duty or for death resulting from such an injury. An application of these statutes to the instant case presents the inquiry, Did the plaintiff, while engaged in the line of his duty, perform the service of operating the unhairing machine in a way that the employer required, permitted, or suffered in the method, process, or condition of safety in the conduct of its business? As we have heretofore suggested, the plaintiff's evidence permitted of the inference that he pursued the customary method and process of operating the machine when he reached over the guard to adjust the hide on the bolster, and while so engaged his hand was caught in the knife cylinder and severely injured. From the view as we comprehend the case, it was error to hold that the plaintiff was guilty of contributory negligence as a matter of law. The evidence upon these issues presented a case for the jury.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court for a new trial.

WINSLOW, C. J., dissents.

BARNES, J. (*dissenting*). There is much to be said in support of the contention that the defense of contributory negligence was abolished by ch. 485, Laws of 1911. The court decides otherwise, and I am not disposed to dissent from that proposition.

I think the plaintiff was guilty of contributory negligence. It was shown without dispute (1) that there was a perfectly safe way to do the work which plaintiff was doing when injured; (2) that it was well known to him and could be followed without effort or loss of time; and (3) that he chose an obviously dangerous method. This I think constituted contributory negligence as distinguished from assumption of hazard. I do not see how the failure of duty on the part of the defendant affects the question. That goes to its negligence,

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not to the contributory negligence of the plaintiff. It seems to me that the logical effect of the decision is to abolish the defense of contributory negligence in fact though not in form in practically all cases where assumption of hazard is no longer a defense.

PRZYBYLA, by guardian *ad litem*, Appellant, vs. CHAIN BELT COMPANY, Respondent.

April 11—May 1, 1914.

Milwaukee civil court: Trial by jury: Denial of right: Appeal: Ground for reversal.

1. Where one party to a civil action in the Milwaukee civil court demands a jury and pays the fees required by sub. 2, sec. 19, ch. 549, Laws of 1909, the case becomes a jury case and it is not necessary for the opposing party to demand a jury.
2. The party making the demand may, before the trial, waive his right to a jury trial and if he does so will not be obliged to pay the additional trial fee, but the opponent may then insist that the case remain a jury case and pay such fee.
3. Denial of the jury trial to which a party was entitled in the Milwaukee civil court is ground for reversal of the judgment of that court and the granting of a new trial in the circuit court.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appellant commenced an action in the civil court of Milwaukee county for personal injuries received by him while employed in defendant's shop. It appears by the docket of that court that upon the return day and before the joining of issue the plaintiff demanded a jury trial before a jury of six, and paid $6 into court as a jury fee, and the case was adjourned to the next term for trial. The docket shows the following entries on the adjourned day:

"The plaintiff by his attorneys waives the trial by jury. The defendant thereupon demands a trial by jury. Plaintiff objects to the granting of a jury trial to the defendant. The court denies the motion of the defendant. Exception."

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The trial afterwards proceeded before the court, findings of fact were made and judgment rendered thereon for the plaintiff, from which judgment an appeal was taken to the circuit court, where the judgment was reversed on the ground of manifest prejudicial error, in that (1) the defendant was denied a trial by jury, and (2) the evidence does not sustain the findings and judgment; and a new trial of the action was ordered in the circuit court. From this order the present appeal is taken.

The statute creating the civil court (ch. 549, Laws of 1909) provides that either party to a civil action may, at or prior to the time of joining issue, demand that the action be tried by a jury of six men or by a jury of twelve men, on first paying to the clerk of the court $6 or $12, as the case may be; that a failure to make such demand shall be a waiver of the right; and that when such demand is made and such sum deposited, "the first six persons, when a trial by a jury of twelve men is not demanded, or the first twelve persons, when a trial by jury is demanded, who appear as their names are drawn and called, and who are not lawfully challenged and are approved as indifferent between the parties and not discharged or excused, *shall* be sworn and constitute the jury to try the issue." Sub. 2, sec. 19. The statute further provides: "There shall be paid to the clerk . . . the following sums only as court fees in a civil action: . . . for the trial of an action by a jury in addition to all other fees two dollars and fifty cents . . ." (sub. 1, sec. 23); also that the clerk shall require prepayment of the fees, unless by an order of one of the judges upon a certain showing he be directed to waive such advance payment (sub. 2, sec. 23); also that all fees, except witness and interpreter fees, shall belong to the county of Milwaukee, but that fees prepaid by either party recovered by any judgment in his favor and paid into court shall be refunded to him by the clerk (sub. 3, sec. 23).

For the appellant there was a brief by *John C. Kleczka*

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and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. Kleczka* and *Mr. W. L. Gold.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

WINSLOW, C. J. In this case it is held:

1. When one party to a civil action demands a jury and pays the fees required by sub. 2 of sec. 19 of the Civil Court Act, it is not necessary for the opposing party to demand a jury, because the case then becomes a jury case, for trial by either six or twelve men, according to the demand which has been made. Any other interpretation of the statute would mean that one party could practically lay a trap for his opponent by demanding a jury and paying the fees and afterwards waiving his demand when it had become too late for his opponent to make it.

2. If the party making the demand conclude before the trial that he does not desire a jury, he may doubtless waive his right to a jury trial, and if he does so he will not be obliged to pay the additional trial fee of $2.50, but the opponent may then insist that the case remain a jury case and pay the additional trial fee.

3. In the present case the record clearly shows that the defendant was denied the jury trial, which was its right, because it was thought that it had waived the right by not demanding the same on the return day, hence the circuit court was right in reversing the judgment on the first ground assigned.

No opinion is expressed as to the second ground assigned for the reversal of the judgment.

By the Court.—Order affirmed.

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YATES vs. YATES: PETITION OF ARTHUR W. YATES. YATES, Respondent, vs. YATES and another, Appellants.

April 11—May 1, 1914.

Divorce: Allowance for support of child: Trust agreement: Revision of judgment: Procedure: Independent action: Death of wife: Abatement of action: Appeal: Joinder.

1. A provision in a divorce judgment for the support of a minor child may be revised or altered upon application to the court under sec. 2369, Stats., even though such provision was embodied in a trust agreement made between the parties whereby a trustee was vested with a trust fund to be devoted to such support, the agreement having been approved by the court and made a part of the judgment.
2. An independent action to annul that part of the divorce judgment because of circumstances which had arisen subsequent to its entry was wrong in practice and should have been dismissed for want of jurisdiction.
3. Death of the divorced wife and the situation created thereby warranted in this case a revision of the judgment and termination of the trust agreement, which contemplated that the child was to reside with the mother; but an application and an order for cancellation of that agreement should not have been based upon the ground that, through inadvertence, the agreement did not provide for its termination in the event of such death, nor upon the ground that, the death having occurred within a year after entry of the judgment, the divorce action abated.
4. Separate appeals should not be taken by parties who are united in interest so that they constitute really but one party, unless their interests can be better protected thereby.

APPEALS from a judgment and from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Judgment reversed; order modified and affirmed.*

In this case there are two appeals from a judgment of the circuit court in the action of Arthur W. Yates v. Georgia Marion Yates and another, and two appeals from an order entered in a special proceeding for modification or vacation of the judgment in Harriet D. Yates v. Arthur W. Yates as re-

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gards the provision for the support of the minor child of the parties.

The controversy in the action and that in the special proceeding were tried together. The court found thus: February 13, 1911, an interlocutory decree of divorce was rendered in an action prosecuted by Harriet D. Yates against *Arthur W. Yates* wherein provision was made for the support of the former and *Georgia Marion Yates,* a minor child of the parties. The provision for support was made by a trust agreement whereby the *First Savings & Trust Company* was vested with a trust fund to be devoted to such support, which agreement was made between the parties and approved by the court and made a part of the decree. Such provision was in recognition of the duty of *Mr. Yates* to provide for the support of his divorced wife and the child. There was no consideration for such agreement other than the accepted discharge of such duty. The custody of the child was awarded Mrs. Yates which was the reason the trust agreement provided for support of such child. The *Trust Company* accepted the trust and received into its possession the trust fund valued at $40,000. After the entry of the interlocutory decree, Mrs. Yates died leaving such child her only heir at law and to whom *Mr. Yates* quitclaimed any right he had, if any, to the estate of the mother. After the death of Mrs. Yates, *Mr. Yates,* with the approval of *Georgia,* caused his sister to be appointed her guardian. Thereafter, and before the commencement of this action, *Mr. Yates* remarried and became, and is, so circumstanced as to be able to furnish his daughter a suitable home in his family. Thereupon her care was surrendered to him and she has ever since resided in his family. There is no longer any necessity whatever for any further continuance of the trust agreement. It was made in contemplation of the daughter, until her majority, residing with Mrs. Yates, which was rendered impossible by her decease. A provision for the support of the daughter, independently of *Mr. Yates,* under the

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changed circumstances, would be unwise. *Mr. Yates* received the form for the trust agreement while he was at a place distant from the place of business of his attorneys and signed it without appreciating that it did not contain any provision for its termination in case of the death of Mrs. Yates. It does not provide, as he supposed in signing it, that in case of the death of Mrs. Yates the custody of the daughter and responsibility for her support during her minority would devolve on him as matter of law. The court found: (1) The divorce action and all arrangements therein abated upon the death of Mrs. Yates. (2) If the trust agreement survived the death of Mrs. Yates it was a part of the interlocutory decree and is subject to revision as in case of a judgment in such an action as regards support of children. (3) The only consideration, as regards the trust agreement respecting the minor child having wholly failed by the death of Mrs. Yates and, by inadvertence, *Mr. Yates* having failed to provide for such a contingency, he is entitled to judicial assistance to avoid the trust.

Upon such facts judgment was entered in favor of *Mr. Yates* in his action to avoid the trust agreement, and an order was entered in the divorce action canceling such agreement and, in general effect, that such action abated by the death of Mrs. Yates within the year after entry of the judgment therein. The guardian *ad litem* and the trustee separately appealed from the judgment and also from the order.

The judgment in the divorce action was in due and absolute form dissolving the marriage contract between *Mr.* and Mrs. Yates, making a final division of property and providing for the support of the minor child in manner above indicated. There was nothing therein indicating that it was interlocutory in character. In form, it was a final closing of the litigation between the parties.

For the appellants there was a brief by *Charles E. Wild* and *Miller, Mack & Fairchild,* and oral argument by *S. J. McMahon.*

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For the respondent the cause was submitted on the brief of *Flanders, Bottum, Fawsett & Bottum.*

MARSHALL, J. Sec. 2364, Stats., provides for making such allowances as that in question. Secs. 2367 and 2368 provide for requiring security for payment of such an allowance. The trust agreement was only what the court might have required under the plain words of the statutes. The fact that the matter was arranged by treaty and then approved by the court and made part of the decree of divorce did not change its character. It was subject to revision by the court at any time during the minority of the child as changed conditions might require, and independently of the year period within which the court possessed authority under sec. 2374 of the Statutes to vacate or modify the decree. Such section does not contain any express provision that such a judgment during such year period shall be interlocutory in the sense taken by the trial court. As indicated in the statement, the decree of divorce was, in form, a final closing of the litigation between Mr. and Mrs. Yates. The statute then, as now, contained these provisions:

"Such judgment, so far as it determines the status of the parties, shall not be effective, except for the purpose of an appeal to review the same, until the expiration of one year from the date of the entry of such judgment." . . .

"So far as said judgment determines the status of the parties the court shall have power to vacate or modify the same, for sufficient cause shown, upon its own motion, or upon the application of either party to the action, at any time within one year from the entry of such judgment. But no such judgment shall be vacated or modified without the service of motion, or order to show cause on the divorce counsel, and on the parties to the action, if they be found. If the judgment shall be vacated it shall restore the parties to the marital relation that existed before the entry of such judgment."

"Such judgment, or any provision of the same, may be reviewed by an appeal taken within one year from the date when

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such judgment was entered. At the expiration of such year, such judgment shall become final and conclusive without further proceedings, unless an appeal be pending, or the court, for sufficient cause shown, upon its own motion, or upon the application of a party to the action, shall otherwise order before the expiration of said period. If an appeal be pending at the expiration of said year, such judgment shall not become final and conclusive until said appeal shall have been finally determined." Sec. 2374.

The record shows that the independent action was not instituted or prosecuted for any other purpose than to avoid the provision in the divorce judgment for support of the minor child. It proceeded from beginning to end, upon the theory that such judgment as to dissolution of the marriage contract and division and award of property to or for the benefit of Mrs. Yates, was not to be disturbed. The record also shows that there was no application in the divorce action to vacate the decree of divorce for cause or otherwise. The proceedings in such action, from the beginning to end, were for the sole purpose of annulling the provision of the decree for support of the minor child, and it was closed accordingly, leaving such decree as to the divorce, entirely undisturbed.

Thus it will be seen that the situation to be dealt with when the two proceedings were commenced, was very simple and covered by the plain words of the written law. Sec. 2369 of the Statutes provides for revising a provision of such a decree relating to support of children in these words:

"After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action. But when a final

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division of the property shall have been made under the provisions of section 2364 no other provisions shall be thereafter made for the wife."

That the condition created by the death of Mrs. Yates warranted an application in the divorce case to discharge the trustee and the court in granting it, is clear. The plain simple way thereto indicated by the statute should have been followed. There was no occasion for an application to cancel the trust agreement because it was executed by *Mr. Yates* without apprehending that it did not contain a provision for its termination in case of the death of Mrs. Yates. The statute amply provided for that contingency in the way of an application to the court for a revision of the judgment. There is nothing in the evidence or findings to show any ground for annulling such agreement upon the ground of mutual mistake or fraud,—nothing whatever. There was no basis for annulling it upon the ground, that by the death of Mrs. Yates the divorce action abated. The findings, judgment, and order so far as based on the theory of abatement, are erroneous.

There was no more reason for holding that the judgment abated as to provision for support of the child than as to any other part of it including the division of property. If it abated, no proceeding therein was proper in advance of its being revived. To treat the action as abated and the decree as to support of the child superseded on that account, and treat it as not abated as to all other matters was inconsistent. Thus the order appealed from, regarded as merely revisory can stand, but not otherwise.

Why was the independent action instituted? The purpose of it, as has been seen, was to vacate a part of the decree in the divorce action because of circumstances which had arisen subsequent to its entry. The sole way of dealing with such a matter is by petition in the action. It has been firmly settled that an independent action for such a purpose is so

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wrong in practice as to be regarded jurisdictionally erroneous. *Platto v. Deuster,* 22 Wis. 482; *Endter v. Lennon,* 46 Wis. 299, 50 N. W. 194; *Orient Ins. Co. v. Sloan,* 70 Wis. 611, 36 N. W. 388; *Stein v. Benedict,* 83 Wis. 603, 610, 53 N. W. 891; *Jackson M. Co. v. Scott,* 130 Wis. 267, 110 N. W. 184; *Pleshek v. McDonell,* 130 Wis. 445, 110 N. W. 269; *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183.

So the court should have dismissed the independent action for want of jurisdiction, whether the point was raised by counsel or not, and this court must correct the mistake in not doing so by reversing the judgment on both appeals and remanding the cause with directions to dismiss with costs.

The general result is that there were two proceedings, made quite complicated, to reach a simple matter, which the statute plainly contemplates shall be dealt with by a mere petition in the divorce action. A very simple, comparatively inexpensive proceeding by motion, on a petition setting forth the facts, for an order revising the divorce decree as to the particular matter and terminating the trust, was all that was necessary. It is unfortunate that instead thereof two proceedings were resorted to, resulting in two large records and four appeals to this court. When it came to the appeal no reason is perceived why the trustee and the beneficiary did not join. The interests were the same. Separate appeals did not afford any better opportunity for protecting the interests of the beneficiary and the trustee, than one. They were united in interest and constituted really but one party. *Harrigan v. Gilchrist,* 121 Wis. 127, 449, 99 N. W. 909. In all such cases, the study should be to save needless expense.

By the Court.—The order appealed from is so modified as to be revisory only of the divorce decree as to the provision for support of *Georgia Marion Yates,* terminating the trust, and requiring an accounting and restitution by the trustee as provided in such order, and as so modified, affirmed on both appeals. The judgment appealed from is reversed, and

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the cause remanded with directions to dismiss with costs. No costs will be allowed in this court to either party on the appeals from the order, but the appellant will pay the clerk's fees. On the reversal of the judgment one bill of costs will be allowed, the two appellants being regarded as one party.

CITY OF MILWAUKEE, Respondent, vs. REIFF and another, Appellants.

April 11—May 1, 1914.

Statutes: Validity: Classification of cities: Municipal corporations: Salaried officers: Compensation: Extra services: Recovery of moneys illegally paid.

1. Ch. 376, Laws of 1897, fixing the salary of the city clerk in all cities having a population of 150,000 or more, and authorizing him to employ experts to assist him in making the tax roll, is a general law and valid, although Milwaukee was and still is the only city of that size in the state.
2. Sec. 925—31c, Stats. (ch. 493, Laws of 1907),—providing that "no officer or employee receiving a salary from any city, whether organized under general or special law," shall receive any compensation other than such salary for services of any kind rendered to such city,—applies to all cities in the state, including Milwaukee.
3. Where, in violation of sec. 925—31c, Stats., the city clerk of Milwaukee paid to a city officer or employee, who was at the time receiving an annual salary from the city, an additional sum for his services as an expert in preparing the tax roll, such sum is recoverable by the city, even though the services were performed outside of regular office hours. *Frederick v. Douglas Co.* 96 Wis. 411, distinguished.

APPEAL from an order of the circuit court for Milwaukee county: A. H. REID, Judge. *Affirmed.*

This is an action for money had and received commenced by the city of *Milwaukee* against the defendants to recover moneys disbursed by the defendant *Peter F. Leuch* as city

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clerk, and received by *John F. Reiff,* for alleged services rendered by *Reiff* in the preparation of the tax roll of the city of *Milwaukee* for the year 1912. The money was paid under a resolution passed by the common council of the city of *Milwaukee* on July 22, 1912, pursuant to ch. 376, Laws of 1897.

The complaint alleges and the answer admits that the city operates under a special charter and that the defendant *Leuch* held the office of city clerk and received a stated salary of $2,500 per year; that from April, 1912, to November, 1912, *Reiff* held the position of chattel mortgage clerk in the city clerk's office, at a stated yearly salary; that in November, 1912, he was, by the city clerk under the authority of the common council, appointed to, and up to the commencement of this action held, the position of committee clerk and stenographer at a salary of $1,500 per year. It is alleged that the common council on July 22, 1912, appropriated the sum of $4,800 to be drawn upon order to the city clerk and to be placed in the clerk's custody for the purpose of paying for experts the clerk might employ for the making of the tax roll of the city for the year 1912. Among others the clerk employed *Reiff* as an expert to perform this service and paid him as extra compensation the sums stated in the complaint. The answer also alleges that *Reiff* was an expert in such work; that the services rendered by him were necessary in preparing the city tax roll; that the services were performed outside of the regular office hours; and that the amounts paid were a reasonable and proper compensation therefor. The plaintiff demurred to the answer on the ground that it does not state facts sufficient to constitute a defense. This is an appeal from the order sustaining the demurrer.

For the appellants there was a brief by *Marshutz & Hoffman,* attorneys, and *J. H. Marshutz* and *Quarles, Spence & Quarles,* of counsel, and oral argument by *Mr. I. A. Fish* and *Mr. J. H. Marshutz.*

Daniel W. Hoan, city attorney, for the respondent.

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SIEBECKER, J. Ch. 376, Laws of 1897, is entitled "An act to fix the salary of the city clerk in all cities in this state having a population of one hundred and fifty thousand or more, and to require all city officers to file sworn pay rolls for the disbursements of all moneys appropriated for clerk hire or other service." Sec. 1 of the act fixes the salary of the clerk of such cities at $2,500 annually; and sec. 2 provides that such salary shall be in full compensation for the services rendered by him in discharge of his official duties. By sec. 3 it is enacted:

"The city clerk shall make the tax roll of such city as required by law, but he shall receive no compensation for the same other than that provided in section one of this act, but he is hereby authorized to employ such expert assistants as he may deem necessary, the aggregate amount to be paid for such service to be determined by the common council and appropriated for such service from year to year."

In passing on the validity and nature of the act the trial court held, and we think the holding a proper and correct one:

"If that chapter were a special act as claimed it would necessarily be unconstitutional. But its constitutionality is doubtless saved by the fact that it applies to all cities in the state of 150,000 population or more, and while at the time of the enactment there was and still is but one city of that size in the state, it would apply to any city acquiring that size in the future, and is just as general in its nature as are those provisions of ch. 40*a* of the Statutes applying to cities of the first class."

Adams v. Beloit, 105 Wis. 363, 81 N. W. 869; *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270.

It is clear that this law was valid as a general law and applied to the city of *Milwaukee,* and that the city clerk was required to make the tax roll, but it authorized him to employ experts to assist him in performing this service.

Ch. 493, Laws of 1907, creates sec. 925—31*c*, Stats., and other sections. Sec. 1 reads: "There are added to the Stat-

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utes of 1898 new sections to read," and enacts eight separate sections, making each one a subsection of sec. 925 of the Statutes. All of the various subsections of sec. 925 are a part of ch. 40*a*, Stats., which is entitled "Of the organization and government of cities under general law." The city of *Milwaukee,* being incorporated by special charter, is of the class of cities covered by ch. 40*b*, Stats., entitled "Of cities under special charter."

Sec. 925—31*c* (ch. 493, Laws of 1907) provides:

"No officer or employee receiving a salary from any city, whether organized under general or special law, shall receive for service of any kind or nature rendered such city any compensation therefor other than the salary fixed and provided for such office. This act shall apply to all officials now serving or hereafter elected or appointed to public place."

The provisions of the act clearly apply generally to the various subjects with which they deal in all cities of the state, and the phrase "whether organized under general or special law," in this section, specifically indicates that the legislature intended this section to apply to all cities of the state, for there can be no city organized outside of the two specified classes, namely, those organized under the general charter law and those organized under special charters. The history of legislation shows that the legislature has incorporated provisions in ch. 40*a* which by express terms or by necessary implication apply generally to both classes of cities. There is no variance between the provisions of sec. 925—31*c* and the provisions of the charter of the city of *Milwaukee,* and hence the provisions of secs. 4986 and 4987 have no controlling effect on the question here presented. Since, then, sec. 925—31*c* applies to and must govern the subject of this litigation in the city of *Milwaukee,* it necessarily follows that the payments made to *Reiff* for services as an expert in extending the city tax roll for the year 1912 were contrary to the express provisions of this act, in view of the fact that he was at the time

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a city officer receiving an annual salary from the city. The moneys so received by him from the city were disbursed without any legal warrant or authority and are therefore recoverable in an action like this one. The payments having been made in violation of a law which forbade them renders the equitable doctrine such as ruled the case of *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798, inapplicable here. The trial court properly sustained the demurrer to the answer.

By the Court.—The order appealed from is affirmed.

BAUMGARTEN, Appellant, vs. MATCHETTE, Respondent.

April 11—May 1, 1914.

Appealable orders: Suppressing examination of adverse party.

An order of the circuit court affirming an order of the Milwaukee civil court suppressing an examination of the defendant under sec. 4096, Stats., until after the service and filing of the complaint, is not appealable.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Dismissed.*

Charles E. Hammersley, for the appellant.

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *S. J. McMahon.*

KERWIN, J. This action was commenced in the civil court of Milwaukee county. At the time of the commencement thereof an affidavit and notice for examination of the respondent and his agent under sec. 4096, Stats., before a court commissioner were served. Afterwards a motion was made in the civil court by the respondent to deny and suppress the notice, subpœna, and examination under sec. 4096, Stats., and

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all other proceedings had for the purpose of such examination, and to stay all proceedings for the purpose of procuring such examination until the plaintiff served his complaint. The motion was heard before the civil court, and an order made granting it and staying proceedings until the plaintiff filed his complaint. An appeal was taken from this order to the circuit court; the circuit court affirmed the order of the civil court, and the appellant appealed to this court from such order of the circuit court.

The question arises whether this order is appealable. Sec. 3069, Stats., specifies what orders of the circuit court may be brought here by appeal, and the present order is not included in the appealable orders mentioned in this section. This case is ruled by *Wildes v. Franke, ante,* p. 189, 146 N. W. 1119.

By the Court.—The appeal is dismissed.

LUTHER, by guardian *ad litem,* Respondent, vs. SHAW, Appellant.

April 11—May 1, 1914.

Breach of marriage promise: Evidence: Harmless errors: Aggravation of damages: Seduction: Attempt to blacken character: Exemplary damages: Excessive award.

1. In an action for breach of promise of marriage the admission of evidence that defendant's father was president of a steel foundry company was not prejudicial error as inducing a verdict for larger damages than the jury would otherwise have given.
2. In such an action seduction under promise of marriage and also an attempt made at the trial, not in good faith or with any reasonable hope or expectation of establishing such fact, to show that plaintiff was a lewd woman or of immoral character, might properly be considered in aggravation of damages.
3. Exemplary damages may be allowed in such an action where there are circumstances of aggravation.

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4. In an action for breach of promise of marriage, where seduction was shown and an attempt was made at the trial to besmirch plaintiff's character, an award of $3,000 compensatory damages and $500 punitory damages is *held* not to indicate perversity, passion, or prejudice on the part of the jury; and after reduction of the compensatory damages to $1,500 by the trial court the amount allowed is not excessive, although defendant was an artisan without property.

APPEAL from a judgment of the circuit court for Milwaukee county: OREEN T. WILLIAMS, Circuit Judge. *Affirmed.*

Edgar L. Wood, for the appellant.

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

TIMLIN, J. In this action for breach of promise of marriage the jury assessed in favor of the plaintiff compensatory damages at $3,000 and punitory damages $500. The circuit court reduced the compensatory damages to $1,500.

Error is assigned in the admission of evidence, in the instructions to the jury, and in denying a motion for a new trial. The defendant was examined as an adverse witness, and, after stating that his father's business was a "steel foundry" called "the Milwaukee Steel Foundry Company," was asked: "Does he hold any position there?" Objection to this question as irrelevant and immaterial was overruled, and the defendant answered "President." It is argued that this was prejudicial as inducing a verdict for larger damages. We cannot think that ordinary, sensible jurymen are so easily influenced, nor can we undertake to reverse judgments for such trifling departures from absolute logic in the presentation of evidence. Respondent seeks to justify the admission of this evidence on the ground that it tended to show the social standing of the parties to this action and to the contract of marriage. It is evidence of the same general nature as that usually offered to show social standing, although such

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inference from the quoted testimony seems rather strained. We prefer to overrule the assignment of error on the ground first above stated.

Error is next assigned on the following instructions: "1. . . . and if you so find [referring to the question of seduction], then this seduction may be taken by you in aggravation of damages." . . . This was substantially correct. "2. . . . if you find . . . that the defendant has attempted to prove that the plaintiff was a lewd or base woman, and was of immoral or bad character, and that he has failed to establish and prove the same by a preponderance of the evidence; and if you shall further find that such attempt was not made in good faith or was made without any reasonable hope or expectation of establishing such facts, then such charge and failure on the part of the defendant may be taken and considered by you in aggravation of the damages in this case." This instruction follows very closely the opinion of this court per LYON, J., in *Leavitt v. Cutler,* 37 Wis. 46, commented upon in *Alberts v. Albertz,* 78 Wis. 72, 47 N. W. 95. It was given here with reference to the compensatory damages, although I think from the authorities referred to by Judge LYON and the nature of the damages the learned justice had reference in *Leavitt v. Cutler, supra,* to exemplary damages. It may perhaps apply to either or both kinds of damages. That is not necessary to decide. Complaint is not made on this ground. In any case this instruction fairly leaves it to the jury to determine whether or not the attempt to besmirch the character of the plaintiff was made in good faith, and that, only in the event that they found it was not so made, or was made without any reasonable hope or expectation of establishing such facts, could the jury consider the evidence so offered "in aggravation of damages."

It is quite well settled that in breach of promise cases where there are circumstances of aggravation exemplary dam-

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ages may be allowed. 3 Sutherland, Dam. (3d ed.) § 987 and cases, citing *Leavitt v. Cutler, supra;* 1 Sedgwick, Dam. (9th ed.) § 370.

The damages as reduced by the learned circuit court do not seem too large, nor are we convinced that an award of $3,000 damages in a breach of promise case aggravated by seduction of plaintiff indicates perversity, passion, or prejudice on the part of the jury. True it is that the defendant is an artisan without property and that it required no long siege or consummate strategy to induce the plaintiff to surrender the citadel of virtue. But we must consider that he was an iron molder and she a factory girl, hence each probably more practical than refined or sentimental, and that she had his promise of marriage and for this reason yielded, and that he was guilty of the perfidy of breaking such a promise, leaving her to bear the loss, suffering, and shame alone, and that he attempted in the defense of this case, in bad faith as found by the jury, to further blacken her reputation. Under such circumstances we cannot say the damages, compensatory and punitory, carried by the judgment are excessive.

By the Court.—Judgment affirmed.

LUTHER, Respondent, vs. SHAW, Appellant.

April 11—May 1, 1914.

Seduction: Action by parent: Exemplary damages: Recovery in action by female not a bar: Excessive award: Reduction: Instructions to jury.

1. In an action for loss of services of plaintiff's daughter by reason of her seduction, recovery is based upon a wilful wrong and exemplary damages are recoverable.
2. The jury in such a case having been properly given broad discretion as to exemplary damages to assess a sum which they deemed just and proper and best calculated to be an example to

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defendant and to others, the award, even though very large, cannot be held to show that the verdict was perverse and should not stand for any purpose.

3. Since exemplary damages rest upon vague and unmeasurable bases, the court should, and it does, exercise revisory power over such verdicts.
4. The fact that exemplary damages were recovered for the same wilful act in an action by the daughter for breach of promise of marriage, cannot be considered in bar or in mitigation of exemplary damages for the seduction in an action by the father for loss of the daughter's services.
5. An award of $1,500 (reduced by the trial court from $5,000) as exemplary damages in such an action by the father, where the amount allowed as compensatory damages was so small as to indicate that nothing was allowed under that head for wounded honor or sensibilities, is allowed to stand although, had the trial court not reduced the award, this court would have reduced it still more.
6. An instruction in such case that the jury might consider the financial condition of the defendant was not objectionable as carrying the meaning that he had property or prospects; and the fact that in assessing the damages the jury did not consider his lack of property did not constitute error.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Edgar L. Wood, for the appellant.

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

TIMLIN, J. This is an action by the father of Elsie Luther, plaintiff in the preceding case, to recover such damages as are at common law recoverable in an action nominally for loss of services of a daughter, caused by her seduction and consequent sickness, etc. The jury returned a general verdict in favor of the plaintiff for $150 compensatory and $5,000 exemplary or punitory damages. The court on motion reduced the punitory damages to $1,500. The evidence was identical with that in the case of Elsie Luther against the same defendant. The rulings upon evidence were similar, and the decision in that case disposes of all the

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questions attempted to be raised by the defendant on this appeal except those relating to the amount of damages. The trial court instructed the jury with reference to the measure of damages as follows:

"If you find that the plaintiff in this action is entitled to recover damages, he is not only entitled to recover for the loss of his daughter's services and for the value of them, and for medical expenses of her illness which he incurred, but also for his wounded feelings and affections, his sense of shame, humiliation and disgrace for the wrong done him in his social and family relations, and for the stain and dishonor brought on the family, the dishonor of himself and family, and the example to his other children. . . . And if you believe that defendant's conduct and the public good require that you should assess against him by way of punishment, damages in addition to the actual loss plaintiff has sustained, then you will assess against him a sum for punitory damages as in your judgment you deem just and proper and best calculated to be an example to him and to those who may be inclined to commit like offenses. And in assessing such punitory damages, if any you deem proper to assess, you may take into consideration the financial condition of the defendant. . . . From the fact the court has instructed you you may assess punitory damages if you deem just and proper in this case, you should not infer that you must do so. Whether you shall do so or not, is left to your sound judgment under the instructions of the court and the evidence in the case."

The amount assessed for compensatory damages is so small as to indicate that the jury carefully computed plaintiff's pecuniary loss and allowed nothing under this head for wounded honor or sensibilities. The case was one in which exemplary or punitory damages were permissible. The amount fixed by the jury as punitory or exemplary damages is very large. It is first argued that this indicates bias on the part of the jury and that the verdict is therefore perverse and should not stand for any purpose, and second, that the exemplary damages even as reduced by the trial court are excessive. In actions of this kind recovery is based upon a

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wilful wrong. The action is founded in tort, and the instant case carries the circumstances of aggravation necessary to justify exemplary damages, which are generally recoverable in such cases. *Lavery v. Crooke,* 52 Wis. 612, 9 N. W. 599; *Klopfer v. Bromme,* 26 Wis. 372; 4 Sutherland, Dam. (3d ed.) § 1283; 1 Sedgwick, Dam. (9th ed.) § 376.

Where the jury are properly given such broad discretion with reference to exemplary damages, as indicated by the quoted instructions, whereby they were told they might assess against the defendant a sum which they deemed just and proper and best calculated to be an example to him and to others, such jury are entitled to accept these instructions in good faith as meaning just what they say. How, then, can it be said their verdict is perverse? They disregarded no evidence and violated no instructions in fixing these exemplary damages. Their estimate of what would be sufficient as a punishment and a deterrent and an example was very high compared with the actual damages assessed, and high from any viewpoint. But it would hardly be candid to invite them, in the language of this instruction, to fix a sum which expressed their judgment in such matter and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed. There must always exist a great diversity of views upon such subjects. But because these exemplary damages rest upon such vague and unmeasurable bases the court should and it does exercise revisory power over such verdicts. *Rogers v. Henry,* 32 Wis. 327; *Templeton v. Graves,* 59 Wis. 95, 17 N. W. 672. It has been held, however, in a number of cases that the court will rarely interfere with the award of exemplary damages on the ground that such award is excessive. 4 Sutherland, Dam. (3d ed.) § 1217 and cases; *Bennett v. Beam,* 42 Mich.

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346, 4 N. W. 8, and other cases cited in note 4, § 1281, p. 3753, 4 Sutherland, Dam.; *Morgan v. Ross,* 74 Mo. 318, and other cases cited in note 6, p. 3764, § 1283, Id.; *Hartpence v. Rogers,* 143 Mo. 623, 45 S. W. 650. This whole subject of exemplary or punitory damages has been heretofore a matter of much discussion which has now considerably abated. 5 Western Law Jour. 193, 289; 8 Wash. Law Rep. 49; 13 id. 652; 4 Wis. Legal News, 380; 3 Am. Law Jour. N. S. 537; 4 id. 61; 3 Kan. Law Jour. 369; 20 Am. Law Reg. N. S. 570; 32 id. 517. But this court long ago refused to overrule the cases adopting and establishing the rule of exemplary damages for this state. *Templeton v. Graves,* 59 Wis. 95, 17 N. W. 672; *Bass v. C. & N. W. R. Co.* 42 Wis. 654. From the doctrinaire viewpoint and assuming as premises that damages should never exceed compensation and that every mulct imposed as a punishment or deterrent should go into the public treasury, the award of such damages to the plaintiff in a private prosecution would seem to be illogical.

Speaking for myself only in this paragraph, I am inclined to admit that, assuming these premises, the lack of logic is quite apparent. But it is a commonplace observation that illogical systems of government often achieve better results than those which are strictly logical. The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law. The latter law must be uniform as to persons and acts, must fix a maximum and minimum punishment on this basis, and cannot always be adjusted to particular circumstances of atrocity which occasionally occur. The maximum penalty, together with compensatory damages for the wrongful taking of one little

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ewe lamb, would be quite inadequate and unsatisfactory in the hypothetical case put by Nathan to David. If some American multimillionaire should emulate the antics of Lucius Veratius with reference to personal or property rights, justice might require some deterrent not found in the criminal-law penalties plus compensatory damages. The ordinary case of aggravated newspaper libel where the actual damages are small, or the case of malicious abuse of legal process, will supply more modern instances.

We do not think the fact, that for the same wrongful act whereby plaintiff's daughter also suffered the defendant had against him a verdict of $500 exemplary or punitory damages, can be considered in bar or in mitigation of exemplary or punitory damages in this case. It was ruled that the liability of the defendant to punishment by the state could not be considered in mitigation; and *a fortiori* it could not be considered in bar of exemplary damages. *Klopfer v. Bromme,* 26 Wis. 372. Where the defendant has already been punished criminally, exemplary damages might nevertheless be given in a civil suit. *Roberts v. Mason,* 10 Ohio St. 277; *Cole v. Tucker,* 6 Tex. 266; *Corwin v. Walton,* 18 Mo. 71; *Hoadley v. Watson,* 45 Vt. 289. It is not novel that the same act may constitute two offenses, as an offense against the state and an offense against the United States. *U. S. v. Marigold,* 9 How. 560; *Fox v. Ohio,* 5 How. 410.

It is well known that the same act may be punished as a violation of a city ordinance and again as a violation of the state law. So punitory damages may be given in a civil action, although the defendant may have been punished criminally for the same act. *Brown v. Swineford,* 44 Wis. 282. We have found no precedent holding that for the same act which constituted a wrong against two different persons the defendant may or that he may not be subject to exemplary damages at the suit of each, although cases like *Klopfer v. Bromme, supra,* and *Brown v. Swineford, supra,* furnish some analogy to show that he may be so liable. If

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the point has ever been directly adjudicated we have been unable to find such adjudication. But there is a decided implication in the language of the adjudged cases and in the text of Sutherland on Damages to the effect that this may be done. Sutherland, Dam. (3d ed.) §§ 987, 1281, 1283, and 1216. In the case of a libel of several different persons by a single publication they must bring several actions, and it seems quite proper, where express malice is shown, that each should recover exemplary damages. Had the learned circuit judge not cut down this verdict for exemplary damages we would no doubt have reduced it considerably below the sum fixed by the circuit judge. But we have the judgment of the jury and the trial judge as to what is a proper amount for punishment, warning, and deterrent, and with some hesitation we will allow the damages to stand as fixed by the circuit judge.

It was further argued that the court erred in instructing the jury that they were permitted to consider the financial condition of defendant. The instruction is strictly correct, and taken literally it applies whether the defendant is of great or of little wealth. The former may be taken to increase and the latter to diminish the amount of punitory damages, although the punishment itself is equal. There was evidence tending to show that the defendant was a molder by trade and worked at his trade, but not that he had any property. It is argued that the jury must have understood this as meaning that he had property or prospects. We think not. If the instruction is literally correct, it is only reasonable to consider that the jury made application of it to the evidence before them. It related to something they were not obliged or required to consider, but that they were at liberty to consider if they saw fit. The result tends to show that they did not consider it. This constitutes no reversible error.

By the Court.—Judgment affirmed.

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FRANKE, Respondent, vs. H. P. NELSON COMPANY, imp., Appellant.

April 11—May 1, 1914.

Pleading: Demurrer: Sufficiency of complaint: Misjoinder of causes: Defect of parties: Equity: Quieting title to securities: Preventing multiplicity of actions: Proper and necessary parties.

1. A general demurrer will not lie to a complaint which states any cause of action, legal or equitable.
2. To make a cause of action there must be a right in the plaintiff and a violation of such right by the defendant.
3. A complaint alleging that one of the defendants, a piano company, sold pianos to various persons on credit, taking promissory notes therefor secured by collateral agreements, which notes and agreements (about forty-eight in number) it sold and delivered to plaintiff; that afterward it sold duplicate and triplicate copies of such collateral agreements to other defendants, who assert a paramount claim thereto, have collected money thereon, and have notified the purchasers not to pay the plaintiff; and that in some instances it has taken back the pianos, resold them, and taken new notes and securities which it has disposed of to still other defendants, is *held* to state a cause of action in equity to determine the title to the securities and to adjust the rights and equities of the parties in respect thereto and to the moneys collected thereon.
4. The prevention of a multiplicity of actions is sufficient to justify the resort to equity in such a case, the title of the parties, except the piano company, being derived from a common source, the matters in dispute being of the same nature and having a connection with each other, and all the parties being more or less concerned in the result.
5. Such complaint states a single cause of action and is not open to the objection that several causes of action are improperly united, even though greater relief may be asked for than plaintiff is entitled to.
6. A demurrer to such complaint on the ground that there is a defect of parties defendant in that the several makers of the contracts sold to plaintiff are not made parties, sufficiently particularizes the defect relied on, under sec. 2651, Stats., since plaintiff could readily ascertain from the contracts the names of such omitted parties.
7. When a final judgment is entered in the action determining and

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quieting the title to the securities, the debtors may safely act thereon and make payment to such parties as the court decides are entitled thereto, and the defeated claimants will be estopped from asserting any rights against them. There is, therefore, no apparent necessity for such debtors to be made parties.

8. The necessity of joining such parties not appearing on the face of the complaint, the defect, if there be one in that respect, should be taken advantage of by answer, as provided in sec. 2653, Stats.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to the complaint in the action. In such complaint the following named corporations are made defendants: Heller Piano Company, Commercial Securities Company, *H. P. Nelson Company,* Hamilton Investment Company, and Merchants Discount Company. And the following individuals are named as defendants: Cornelius Wolf, Peter Wolf, and Albert Salomon, copartners doing business as Badger Investment Company; Earl C. Juneau, C. H. Landwehr, and Henry J. Nunnemacher. The complaint sets forth that the Heller Piano Company was engaged in the business of manufacturing and dealing in pianos and musical instruments in Milwaukee; that such pianos and instruments were sold and delivered by the Heller Piano Company to various purchasers, such purchasers executing and delivering to said piano company promissory notes payable in instalments, secured by collateral agreements in writing; "that the said Heller Piano Company, between the 1st day of January, 1911, and the 1st day of October, 1913, of the notes and contracts so received by it, for a good and valuable consideration, sold, assigned, and conveyed to the plaintiff notes and contracts" executed by a large number of purchasers, and that certain other notes and contracts were assigned to one Reichardt, who in turn sold and assigned them to the plaintiff; that the piano company required the purchaser of instruments to execute the written contracts referred to in

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duplicate and sometimes in triplicate, and that after the sales to the plaintiff such duplicate and triplicate contracts were sold to other defendants in the action, and that in each instance it was represented that the purchaser was securing a good title to the security sold and to the instrument described therein, subject to the right of the purchaser of the instrument to acquire title on payment of the purchase price, and that the defendants who purchased such duplicate and triplicate contracts were claiming the right to enforce the alleged securities which they held. It is further alleged that in some instances the piano company took back the pianos described in the complaint, which they had sold, and resold them a second or third time, taking duplicate and triplicate contracts from the later purchasers, and that these contracts and the notes given therewith were in turn sold to some of the defendants, instead of being turned over to the plaintiff. The complaint further states that the piano company collected various sums aggregating $25,000, which belonged to the plaintiff and which it has failed to pay over and which it has converted to its own use; that the accounts of the piano company are so hopelessly confused that it is now impossible to tell what the rights of the parties in and to the contracts and notes are, and that the plaintiff and certain of the defendants have served notice on the makers of the notes and contracts claiming to be entitled to the money due thereon, and that such makers in some instances, not knowing whom to pay, have refused to pay any one; that the Commercial Securities Company and the *H. P. Nelson Company* are really adjuncts of the Heller Piano Company and are chargeable with notice of its dishonest practices in the particulars mentioned; that the Heller Piano Company has been allowing the Commercial Securities Company and the *H. P. Nelson Company* to collect from the purchasers of musical instruments, and are arbitrarily withholding from the other defendants and the plaintiff moneys which belong to them; that the Heller Piano Company and its officers and

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stockholders have appropriated large sums of money belonging to the plaintiff; that the Heller Piano Company sold to its codefendants and to the plaintiff negotiable paper secured by said contracts to the amount of $300,000, and that the amount now due to such parties on such paper is upwards of $200,000; that the Heller Piano Company is insolvent, but its general creditors are not interested in the moneys to be collected on said notes; that plaintiff is entitled to priority as against the Securities Company and the *Nelson Company* in all notes and contracts which it holds; that plaintiff has no adequate remedy at law; that it is necessary to appoint some disinterested person *pendente lite* to collect instalments as they become due and pay the money into court, to the end that it may be paid over to the party entitled thereto; that there is now actually due the plaintiff on the notes and contracts purchased by him $11,500.

The relief demanded was (1) that some disinterested person be appointed with full power to collect in all outstanding money that may be due or may become due on the notes or contracts obtained by the Heller Piano Company, and hold the same subject to the order of this court; (2) that an accounting be had between the plaintiff and the Heller Piano Company and all of the other defendants, and between all of the parties hereto as to each other, and between all the parties hereto and all other persons, firms, or corporations who may desire to become parties hereto, to the end that the final judgment to be entered herein shall equitably dispose of all of the rights of all persons, firms, and corporations interested, as such rights may appear; (3) that the Heller Piano Company and all of the other defendants and all other persons, firms, and corporations, their agents, servants, and employees, be restrained and enjoined from collecting or receiving any moneys whatsoever on said notes, contracts, and other evidences of indebtedness or from interfering in any way with such notes, contracts, and evidences of indebtedness; (4) that a full, com-

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plete, and final partition and division of all of said notes and contracts and other evidences of indebtedness be had between the parties; (5) that a final judgment be entered in favor of the plaintiff and against each of said defendants who may be indebted to him or have property in their possession belonging to plaintiff, for such amount as the court upon hearing may determine; (6) that the sale and transfer of the notes, contracts, and securities of the Heller Piano Company to either the said *H. P. Nelson Company* or the said Hamilton Investment Company be declared null and void; (7) that plaintiff have such other and further relief as may be just and equitable.

Upon the original complaint a preliminary injunction was issued, which, among other things, restrained the defendants and each of them and their agents and attorneys from collecting any of the moneys now due or which might thereafter become due on the outstanding notes and contracts mentioned in the complaint. The Heller Piano Company was restrained from disposing of the notes, contracts, or securities referred to in the complaint, and restrained from interfering with the plaintiff in collecting the moneys due thereon or which might thereafter become due thereon.

The amendment to the original complaint consisted in substituting the name of Earl C. Juneau for that of N. S. Robinson as one of the parties defendant, and in setting forth that the Badger Investment Company was a copartnership consisting of Cornelius Wolf, Peter Wolf, and Albert Salomon, the original complaint alleging that said company was a corporation. The *H. P. Nelson Company* interposed an answer to the original complaint and demurred to the amended complaint on the following grounds: (1) The complaint did not state facts sufficient to constitute a cause of action. (2) There is a misjoinder of causes of action in the complaint. (3) There is a defect of necessary parties defendant, in that the several makers of the contracts for the sale of the pianos alleged to have been sold and delivered by the Heller

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Piano Company to the plaintiff are not made parties. The demurrer was overruled.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* and oral argument by *A. D. Stebbins.*

William E. Burke, for the respondent.

BARNES, J. If the complaint states any cause of action legal or equitable, a demurrer on the ground that no cause of action is stated will not lie. Sec. 2649*a,* Stats.; *St. Croix C. C. Co. v. Musser-Sauntry L., L. & M. Co.* 145 Wis. 267, 130 N. W. 102; *State ex rel. Att'y Gen. v. Norcross,* 132 Wis. 534, 112 N. W. 40.

The action apparently is primarily brought to quiet title to certain choses in action held by the plaintiff, consisting of notes secured by liens on the pianos in payment for which the notes were given. As incidental to the main relief, certain of the defendants are asked to account for and pay over to the plaintiff moneys which they collected from the purchasers of pianos which the plaintiff asserts belong to him. Plaintiff also seeks to have the defendants turn over to him the securities taken on resales of pianos where he holds the notes and liens given on the original sale, on the ground that he is in fact the owner of such securities because of the liens which he held on the musical instruments by virtue of the original sales.

Unless the complaint shows a primary right on the part of the plaintiff, a corresponding duty on the part of the appellant, and a violation of that right or duty by the appellant, no cause of action exists. There must be a right in the plaintiff and a violation of it by the defendant to make a cause of action. *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445.

As to the pianos still held by the purchasers named in the contracts enumerated in the complaint, the plaintiff asserts the right to be declared to be the true owner of the notes and contracts outstanding and of the right to collect such notes

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from the makers, in cash or by seizure and sale of the pianos under the contracts assigned to him, without interference or molestation from the defendants. It is alleged that the right has been violated by the defendants in at least three particulars: (1) By asserting a paramount claim to the securities given by the purchasers; (2) by actually collecting money from them on the strength of such claim; and (3) by forbidding the purchasers to pay plaintiff the amounts due him.

As to the pianos which were taken back and resold, the plaintiff asserts the right to have the cash paid on the resale turned over to him, and the further right to have the securities taken on such resale delivered to him. If these rights existed, the complaint shows that they have been flagrantly violated. It is quite clear that the complaint shows a primary right and a violation of such right. The real question presented is: Has the plaintiff an adequate remedy at law? He can commence suits against the makers of the securities which he holds on instalments as they become due, and in such suits the ownership of the securities may be determined by bringing all parties in interest before the court, but it does not follow that such a remedy is adequate.

In each instance there are two or more persons who claim to be the sole owners of a chose in action. The debtor does not know which one to pay, and to be on the safe side must refuse to pay any of the claimants. Of course the debtor can wait until suit is brought and then pay the money into court and ask that all claimants to the fund be made parties to the action and then let them fight it out. But such a proceeding involves expense to the purchasers and as many actions as there are contracts. Undoubtedly many of the debtors can ill afford the expense, and if it were otherwise that would be no good reason why they should be subjected to it. The title to the securities being once determined by a judgment of court, the necessity for further litigation will in all probability be obviated. Those desiring to pay will have a

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means of knowing to whom payments may be made, and those who desire to surrender their pianos will know to whom the surrender should be made.

As the matter now stands, none of the debtors can with any degree of safety pay the plaintiff or any one else, because if they should pay the wrong party they may be called upon to pay a second or even a third time. The plaintiff asserts the right to collect the amounts due and to become due on some forty-eight musical instruments sold to as many different purchasers. In each instance there is at least one other claimant. This means, in all probability, that if plaintiff is relegated to his remedy at law he will have to bring a large number of suits and to bring them against persons who may be perfectly willing to pay whenever the not unreasonable privilege is accorded to them of knowing definitely who is entitled to the money. The main object and purpose of this suit is to settle that question and to settle it without a multiplicity of suits and without unnecessary hardship to the plaintiff or to innocent third parties.

It certainly seems reasonable enough to permit the maintenance of a single action to adjust the rights and the equities of the parties thereto. The action commenced partakes of the nature of the old bill of peace. The prevention of a multiplicity of suits is a recognized head of equity jurisdiction. The action can be sustained on this ground and perhaps on other grounds as well, but this one is sufficient. The numerous controversies that would arise in case relief was sought at law would really be controversies between the parties to this suit, because presumably the debtors would in most cases pay what they owed into court and ask that the various claimants who are parties to this action be brought in to litigate their right to the money so paid. The parties to this action, excepting the Heller Piano Company, derive their title to the securities or supposed securities which they hold from a common source; the matters in dispute are of the same

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nature and have a connection with each other, and all of the parties are more or less concerned in the result. These facts are sufficient to justify a resort to the equity side of the court. 16 Cyc. 66 and cases cited; 1 Pomeroy, Eq. Jur. (3d ed.) § 246; *New York & N. H. R. Co. v. Schuyler,* 17 N. Y. 592, 596 *et seq.; Saratoga Co. v. Deyoe,* 77 N. Y. 219, 225; *Black v. Shreeve,* 7 N. J. Eq. 440, 456; *Sheffield Waterworks v. Yeomans,* L. R. 2 Ch. App. Cas. 8, 11.

The contention that several causes of action are improperly united is not well taken. The complaint purports to state but a single cause of action, and no motion has been made to make it more definite and certain by separately stating the different causes of action which the appellant seems to think are stated therein. We think it states but a single cause of action, with which is coupled a demand for relief incidental to the cause stated. It may well be that the plaintiff has not been overmodest in asking relief, but the number of causes of action stated in a complaint is not determined by the comprehensive character of the relief prayed for, and it does not follow that because too much is asked the court is going to grant any greater relief than the plaintiff is justly entitled to.

The complaint was also demurred to on the ground that there is a defect of parties defendant, in that the several makers of the contracts for the sale of pianos alleged to have been sold and delivered by the Heller Piano Company to the plaintiff were not made parties. There is probably a sufficiently particular statement of the defect relied on to comply with sec. 2651, Stats., inasmuch as plaintiff could readily ascertain the names of the persons whom the demurrant claims should be made parties, by consulting the contracts which he holds. *Baker v. Hawkins,* 29 Wis. 576; *Murray v. McGarigle,* 69 Wis. 483, 34 N. W. 522.

It may be that some of those persons are necessary parties to a determination of the controversy which the plaintiff seeks to settle. That fact, if it is a fact, does not appear from the

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face of the complaint. The defect, therefore, if there is one, should be taken advantage of by answer, as provided in sec. 2653, Stats.

We think, when a final judgment is entered in this action determining and quieting title to the securities in controversy, the debtors may act on such determination and make payment to such parties as the court decides are entitled thereto, and that such judgment will estop the defeated claimants from enforcing their alleged claims against such debtors. Certainly after a judgment is entered quieting title to real estate a prospective purchaser or incumbrancer can rely thereon and deal with the party whose title is quieted without fear of successful molestation from the defeated claimant. We see no reason why the same rule should not apply to chattels where equity has jurisdiction to settle the title thereto. For this reason it is not apparent from the complaint why the debtors should be made parties to this suit.

By the Court.—Order affirmed.

DONOVAN, Administrator, Respondent, vs. HOENIG and another, Appellants.

April 11—May 1, 1914.

Vendor and purchaser: Failure to perfect title: Reasonable time: Recovery of money paid and deposited in escrow: Interest.

1. Where, under a contract for the sale of land made on August 24th, a part of the purchase price was paid to the vendor and the remainder was, by agreement, on August 30th deposited in a bank to be held, with the deed, until the vendor should perfect his title if he could do so within a reasonable time, otherwise to be returned to the purchaser, such reasonable time had elapsed prior to November 16th and, the title not then having been perfected, the purchaser could refuse to accept the deed and recover the money paid as well as that deposited.

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2. It appearing in such case that negotiations continued until some time in October and that if the title could then have been made good the purchaser would have accepted the deed, although he had theretofore demanded back the money, a recovery of interest on the amount deposited is allowed only from November 16th, the date of the commencement of the action.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Modified and affirmed.*

This action was brought to recover $1,450 which was the consideration named in an executory contract for the sale of certain real estate made between the plaintiff's intestate, as vendee, and the defendant *Hoenig,* as vendor. Fifty dollars was paid down at the time of the making of the contract, and six days later the balance of the purchase money was placed in the hands of the defendant bank to be turned over to *Hoenig* if he should within a reasonable time clear the title of the property. The plaintiff alleges that the defendant failed to do this, and hence brings this action seeking to recover back $1,400 from *Hoenig* and the bank jointly, and the remaining $50 from *Hoenig* alone. Judgment was rendered in accordance with the prayer of the complaint, and the defendants appeal. The case was tried by the court. The facts were not seriously in dispute, and were in brief as follows: August 24, 1912, one John Donovan, the plaintiff's intestate, and *Hoenig* made a written contract by which *Hoenig* agreed to sell and convey by good and sufficient deed to the intestate a residence property in Brillion, and the intestate agreed to pay $1,450 therefor, of which $50 was paid down and the balance was to be paid August 30th. The property consisted of two adjoining parcels, which, however, formed but one residence property and constituted the homestead of *Hoenig.* Both parties supposed that *Hoenig* had perfect title, and the time between the making of the contract and the payment of the money was apparently allowed so that an abstract might be obtained. On

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August 30th the parties met at the defendant bank to complete the transaction. The intestate had his purchase money with him, but an examination of the abstract showed, and it is admitted, that *Hoenig* had no marketable or record title to a part of the premises called the "Bruss lot." One Barnard had conveyed it to *Hoenig,* but there was no deed on record from Bruss (in whom the record title appeared to be) to Barnard. Mr. Dawson, the cashier of the bank, drew up a deed of the lands. It was signed by *Hoenig* and wife, and it was then agreed by all parties that the bank should hold both the money and the deed and that the money should be paid over to *Hoenig* when "he shall clear the title to property conveyed under warranty deed of even date herewith. . . . Said sum to be held on deposit in this bank until the time specified. If unable to clear within a reasonable time the above mentioned sum shall be returned to said John Donovan." The words quoted are taken from the receipt which the cashier gave to Donovan at the time. It is claimed by the appellant that the evidence shows that the deed was at this time actually delivered to and accepted by Donovan so that title passed. The circuit judge found, however, that while the deed was probably in Donovan's hands at some time during the transaction at the bank, it was never delivered to nor accepted by Donovan in the legal sense, and this seems probable from the fact that, owing to the defect in the title, Donovan was not willing to pay the consideration, and at Dawson's suggestion the arrangement was made that Donovan should be protected by the depositing of both deed and money with the bank to await the clearing of the title. It was supposed by both parties that an unrecorded deed from Bruss to Barnard was in existence and could be at once obtained from Mrs. Barnard, and the title cleared in a day or two. After diligent search, however, no deed was found, and the whereabouts of Bruss were unknown. Donovan wished possession of the premises as early as September 6th and made frequent inquiries as to the clear-

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ing of the title, but received no satisfaction, except that it would soon be cleared. On inquiry information was received by *Hoenig's* attorneys that Bruss had died, leaving as his heirs a brother, residing in the state of Washington, and a sister, residing in Wisconsin, and an action to quiet the title was commenced October 19, 1912, against these heirs, in which judgment was rendered November 21, 1912, quieting the title and declaring it to be in *Hoenig*. Donovan, tired of waiting for the clearing of the title, in September talked with both *Hoenig* and the bank about the matter, but was assured that the difficulty would soon be cleared up. About October 7th he demanded the return of his money from both *Hoenig* and the bank, but was refused by both. This action was commenced November 16, 1912. Both defendants answered on the merits, claiming that the money in fact was the money of *Hoenig*, and *Hoenig* counterclaimed for specific performance of the contract. The court found that *Hoenig* had no marketable title to the Bruss lot August 30th, nor at the time of the commencement of this action; that the judgment in the action to quiet title did not invest him with a marketable title because there was no competent evidence to show that Bruss was dead, or that the defendants in that action were his only heirs; that *Hoenig* did not even have title by adverse possession at the time of the commencement of the action; that *Hoenig* failed to clear the title within a reasonable time under the circumstances, and hence that the plaintiff was entitled to recover his money with interest from August 30, 1912, and with costs against the defendant *Hoenig* alone.

J. E. McMullen, for the appellants.

For the respondent there was a brief by *Hougen & Brady*, and oral argument by *A. L. Hougen*.

WINSLOW, C. J. It being undisputed that *Hoenig* did not have a marketable title to the Bruss lot when the contract was made, there are but four propositions which are deemed nec-

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essary to decide in this case, and they may be briefly stated as follows:

1. There is sufficient evidence to sustain the finding that the deed in question was never delivered to or accepted by the plaintiff's intestate.

2. Under the circumstances shown, more than a reasonable time had elapsed before the commencement of this action in which to perfect the title to the property in question.

3. The title not having been perfected within a reasonable time, the intestate was entitled to refuse to accept the deed and to recover back not only the money deposited in the bank, but the $50 paid to the defendant *Hoenig*.

4. Interest should not have been allowed on the money deposited from August 30th, because it is manifest that the intestate had no right to the return of the money until the "reasonable time" had elapsed within which it was understood that *Hoenig* was to perfect the title. It is not easy to say just when the reasonable time elapsed. It seems evident that it ought not to be held to have elapsed prior to the first week in October, and even after that time there was evidently considerable negotiation between the parties, and it seems quite certain that if the title could have been then made good the deed would have been accepted. Under the circumstances the only satisfactory course seems to be to allow interest on the $1,400 only from November 16th, the date of the commencement of the action. The judgment must be modified as of the date of its rendition by deducting therefrom $17.50, and as so modified affirmed, with costs.

By the Court.—It is so ordered.

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OESAU, Respondent, vs. ESTATE OF OESAU, Appellant.

April 11—May 1, 1914.

Husband and wife: Antenuptial agreements: Validity: Burden of proof: Construction.

1. There is nothing inherently suspicious about antenuptial contracts, and in the absence of unfair characterizing circumstances they are to be regarded with favor rather than disfavor.
2. In general, the burden is upon the one impeaching such a contract to show its invalidity; but if there is anything about it, considering all the circumstances, indicating that the intended wife was unduly influenced to make it, that will overcome its *prima facie* validity.
3. In this case an antenuptial contract between a widower sixty-eight years of age and a widow of sixty-two, each of whom had a family of grown-up children and a substantial fortune and was thoroughly capable of managing all personal affairs, by the terms of which each was to retain ownership, control, and the right to dispose of his or her own property the same as if unmarried, is *held*, upon the evidence, to have been fairly and understandingly made and not to be impeached by any circumstance.
4. The fact that such contract expressly provided that in case either party should die intestate the property of such party should go to his or her own descendants the same as if no marriage had taken place, does not permit a construction rendering the agreement ineffective in case of the testacy of the husband and entitling the widow in such case to claim statutory rights in his estate—that being contrary to the plain purpose of the contract.
5. The intention of the parties at the time such contract is made is to be taken as its legal meaning if it can be found expressed in the language used. If such intention is clearly expressed, rules for construction are unnecessary; but where there is uncertainty as to which of two or more reasonable meanings the minds of the parties met upon, that one should be taken which is most favorable to the woman from the point of view of the parties when it was made.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Proceedings involving the validity and scope of an antenuptial contract.

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In January, 1901, Tjark P. Oesau, a widower with several adult children, and *Amelia Arps,* the plaintiff, then a widow with several grown-up children, intermarried. They were well-to-do German people. He was about sixty-five years of age and possessed a fortune around $17,000. She was sixty-two years of age and possessed a fortune of about $7,000, derived from her deceased husband's estate. She was a woman of considerable business experience and of more than ordinary intelligence, but did not read or understand English words. She was executrix of her first husband's will and attended to the business in an efficient manner. After the settlement of the estate she attended to her business in a frugal and creditable manner. She had a small house worth $700 to $1,000, with suitable furniture therefor. The two persons lived a few miles apart but had been acquainted many years. They were engaged to be married a few weeks before the union took place. Preparatory therefor they went to the office of a reputable attorney to have an antenuptial contract executed. The paper, after having been prepared, was read by the lawyer to *Mrs. Arps.* He could speak German to some extent and did the best he could to make her understand the paper. Mr. Oesau had told her what it was for. She did not get a full understanding of the language used but fully appreciated that if she and Mr. Oesau executed it and then intermarried, it would secure to her capacity to possess and dispose of her property the same as if she were single and he would be likewise protected as to his property. With that understanding the paper was executed in duplicate. One of the two papers was delivered to her and the other was retained by him. At the same time Mr. Oesau proposed to take over *Mrs. Arps's* homestead and give her $700 therefor and that they should reside there. She accepted such proposal. The deed was made, the $700 paid and, shortly after the marriage, they moved to the place and there resided until Mr. Oesau died.

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Sometime after the marriage *Mrs. Oesau* visited a lawyer, who could read and speak German, for the purpose of having her will drawn. At that time she exhibited the contract and was told, as she testified, that it did not amount to anything. Mr. Oesau and plaintiff lived harmoniously together for some eleven years when he died testate. He willed his property in harmony with the antenuptial contract, only making a nominal provision for *Mrs. Oesau* and, in explanation thereof, attached the contract to his will. She possessed her duplicate of the contract from the time it was made. The other duplicate, the day after its date, was duly recorded in the office of the register of deeds of Calumet county. His estate was of the value of about $20,000. In due time she renounced under the will and claimed statutory rights. The executor contested her claim because of the antenuptial agreement. The county court decided that it was void. The circuit court made findings in harmony with the foregoing and decided that the contract did not relinquish prospective statutory rights; moreover, that, under the circumstances, it was presumably void, casting the burden of proof on the executor to show that *Mrs. Oesau* understood the purport thereof when she signed it and that such proof was not produced.

The contract so far as necessary to be examined, is as follows:

"Witnesseth, that whereas, said parties hereto are about to intermarry, it is hereby agreed and understood by and between them that each of said parties hereafter, notwithstanding their intermarriage, shall own and can dispose of any and all real and personal property, money, notes, bonds or securities, of any and all kinds, the same as if no such marriage ever took place between said parties; that is to say, that any and all property, real and personal, moneys, notes, mortgages and securities now owned or that he may hereafter own by said first party, that he can alone without the signature, consent or the will of said second party sell, deed, mortgage and

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transfer the same himself just the same as if he still was a widower; and said second party hereby agrees and binds herself to sign at any time any deed or mortgage of any real estate now owned, or which may hereafter be owned by said Tjark P. Oesau, and that all property, real and personal, money, notes, mortgages and securities owned or belonging to said first party at the time of his death, if he dies intestate, shall go to and belong to the present children and their legal descendants of the said Oesau, without any claim, charge, dower or homestead right or interest of said *Amelia Arps* therein as the wife of said Tjark P. Oesau; and it is hereby agreed and understood by and between both of said parties that any and all property, real, personal, money, notes, mortgages or securities now owned or which may hereafter be owned by said *Amelia Arps,* shall belong to and be exclusively owned and controlled by her, and that she can at any time sell, deed, give away and dispose of all thereof at any time and in whatever way she may see fit, the same as if she were a widow and unmarried, and that if she should die intestate, then that all of her property, money, notes, securities, real and personal, shall descend and go to and belong to her present children or their descendants, and not to Oesau or his heirs; and said first party promises and agrees to at any time when asked by said second party to sign any deed, mortgage, bill of sale or other paper necessary to carry out the purposes and intentions of this contract and agreement, and said Oesau hereby waives and gives up any right or claim which he may have as and by tenancy in curtesy if he should survive said second party, in any property which she may own at her death, and to a full and liberal compliance with the terms and conditions of this agreement and contract, we, and each of said parties for themselves, and for and in behalf of their respective heirs, executors and administrators and assigns bind themselves to faithfully comply therewith in letter and spirit; and that the consideration therefor is the sum of one dollar paid by each of said parties to the other, and other good and valuable considerations."

Judgment was ordered in accordance with the foregoing.

For the appellant there was a brief by *James Kirwan* and *Nash & Nash,* and oral argument by *E. G. Nash.*

J. E. McMullen, for the respondent.

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MARSHALL, J. Did the trial court err in holding the antenuptial contract void?

The stated question turns on some well settled principles which may well be referred to, *Deller v. Deller,* 141 Wis. 255, 124 N. W. 278, for sufficient illustration and support.

There is nothing inherently suspicious about antenuptial contracts. They are, in the absence of unfair characterizing circumstances, to be regarded with favor rather than disfavor. In general, the burden is upon the one impeaching such a contract to support the claim of invalidity rather than upon the adversary to support the contrary. If there is anything about such an instrument, considering all the circumstances, indicating that the intended wife had been unduly influenced to make it, that will overcome its *prima facie* validity, so as to require the person asserting the contrary to, at least, restore such character.

The record does not seem to disclose any circumstance warranting a supposition that the contract in question was not fairly and understandingly made. The ages of the parties, the circumstances that each had been married before and had a good family of grown-up children; that each had a substantial fortune and was thoroughly capable of taking care of all personal affairs and that desire for companionship was the thing desired and, substantially, the only inducement for the proposed marriage, led the two, very naturally, intelligently, and discreetly, to arrange their property matters by the preliminary treaty. The facts all show that the parties were mutually desirous of not entering into a marriage contract under such circumstances as to interfere, in any way, with individual control over property or the prospective rights of their respective children.

In making the contract Mr. Oesau seems to have acted with commendable care. He, in company with his intended wife, visited a reputable lawyer of his county for the purpose of having the paper prepared. The lawyer was the one he had previously employed to perform the service. He explained

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to respondent the object and nature of the paper so she fully understood its purport, though not the meaning of the words used. The lawyer, who could speak the German language to some extent, supplemented Mr. Oesau's efforts. It may be, as stated, that she did not understand all the language used in the paper; but she understood the object of it and the effect of her signing it. She testified, very definitely, that the paper was read to her; that Mr. Oesau translated it to her, and that the lawyer, so far as he could, did so, and that her understanding was that it so provided that each would own and control his or her own property the same as if unmarried. When respondent was interrogated about the meaning of terms used she said that she was not made to understand them; but that counts for little in face of her positive testimony substantially as follows: I understood that the contract would insure to me continued control, as before, of my property and would likewise insure Mr. Oesau. I understood that the effect of the paper was that I could sell my property or will it as I pleased and Mr. Oesau could do the same with his property.

It is evident that, with full understanding as indicated, respondent freely executed the contract in duplicate. The fact that it was so executed; that one of the originals was delivered to respondent and that she had full opportunity to have it explained to her by others for a considerable period of time before the marriage, indicates that there was no disposition on the part of Mr. Oesau to deal unfairly with her. True, there is some evidence given by respondent to the effect that Mr. Oesau suggested keeping the matter secret, but that is of no weight in view of the circumstance that he promptly placed his duplicate of the contract on record where it was open to the public for some days before the marriage and for all the years afterward which elapsed before his death.

We do not fail to note the evidence of respondent's having visited a lawyer of her own race to draw her will and who was

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fully competent to read and explain the agreement to her in the German language; that she showed the paper to him and that after reading it he said it did not amount to anything. That casts no discredit on the agreement. It is quite certain that the lawyer did not advise respondent that the agreement did not amount to anything in the sense that it was unfair or illegal. Respondent, doubtless, exhibited the paper in connection with having her will drawn and was, very properly, told that it did not abridge her liberty to dispose of her property by will.

Looking at the matter before us as indicated, it seems very plain that the trial court erred in deciding that respondent did not understand the purport of the contract when she signed it or that there were any circumstances impeaching its validity.

Was the agreement displaced by the circumstance of Mr. Oesau dying testate? That is not mentioned in the findings but is in an opinion filed and also in the judgment.

It seems to have been thought that the language of the agreement to the effect that, in case of either party dying intestate the property of such party shall go to his or her own children the same as if no marriage had taken place between such parties, will admit of a construction rendering the agreement ineffective, except in case of intestacy; that otherwise the survivor would possess the same rights as if the agreement had not been made, and that, as between such meaning and any other less favorable to the respondent, it should be taken as expressing the intention of the parties.

The rule of construction which the learned circuit court had in mind hardly goes to the extent to which it seems to have been applied. The rule which overshadows all others, in determining the legal meaning of an agreement, applies to antenuptial as well as to other agreements,—there is no difference. The meaning which the parties attributed to the paper they executed at the time it was signed,—their then in-

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tention,—is to be taken as the legal meaning, if it can be found expressed in the language used. In case of a contract being unambiguous no attempt should be made to determine its meaning by rules for construction. In case of its meaning being obscure, then of two or more reasonable meanings and uncertainty as to which the minds of the parties met upon, that one should be taken which is most favorable to the woman from the viewpoint of the parties when the agreement was made.

A contract is not, necessarily, obscure because some particular word or clause, by itself, is susceptible of being read in two or more ways. Notwithstanding that, if looking at the writing in all its parts, the meaning is clear, there is no case for a choice between conflicting reasonable meanings.

In applying the rule of construction referred to, it must be appreciated that only reasonable means, under all the circumstances, looking at the entire paper and the general purpose of it, should be considered in making a choice. That is important. So the question is whether from the viewpoint of the parties at the time they contracted, it can reasonably be supposed that Mr. Oesau and respondent intended to settle their property matters so that the proposed marriage would not prejudice their respective interests and yet to leave the scheme so infirm as to fail, utterly, of any *post-mortem* effect, in case of testacy, to protect the children of the deceased in the full enjoyment of their parent's possessions according to his purpose. Can it be believed that if the parties had any such idea, each would have made a will and thereby wholly nullified the antenuptial contract as to *post-mortem* effect?

The main purpose of the contract, evidently, was to so provide that the family of neither of the parties should profit by the property of the other, and yet, if the trial court be right, they deliberately so agreed that, in case of Mr. Oesau dying testate, the contract would not cut any figure at all in the distribution of his property. We are constrained to hold that

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such an idea is so contrary to the obvious purpose of the parties as not to fall within the class of reasonable meanings from which to choose under the rule in question. On the other hand, it seems so plain that the purpose of the contract was, as we have indicated, that the meaning of the particular language which the trial court dealt with so as to favor respondent can hardly be said to be involved in obscurity. One would hardly think, reasonably, if, in contemplation of marriage, he entered into a contract to preserve his property to himself and his children and yet so provided that in case of his making a will the agreement would be of no effect whatever. It is not considered at all likely that either of the parties to the contract in question contemplated any such outcome of their efforts to preserve, unimpaired by marriage, their liberty as to property matters. The idea embodied in the agreement is that in case of the death of either party the property of such party shall go to his or her family, except as otherwise provided by will.

It must not be thought that the circumstance has been overlooked that respondent at the time of the making of the antenuptial agreement deeded her home to Mr. Oesau for the sum of $700. That was probably all Mr. Oesau thought it was worth. The fact that many years afterwards evidence could be produced that it was worth perhaps two or three hundred dollars more is of no significance. Doubtless, respondent, under the circumstances was better off with the $700 than with the little home. On the whole, it does not seem that the circumstance as to the house has any bearing on the case.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to render judgment in accordance with the opinion and to so remand the cause to the county court for guidance in the further execution of the will of Tjark P. Oesau, deceased.

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MILLER, Respondent, vs. PRESCOTT, Appellant.

April 13—May 1, 1914.

Attorney and client: Failure to collect judgment: Liability of attorney: Good faith.

Where, by reason of his failure to act with reasonable knowledge and skill in the transaction of his client's business, an attorney failed to collect a judgment in favor of such client out of funds belonging to the judgment debtor which came into the attorney's hands, the fact that he acted in good faith and in the honest belief that he was acting for his client's best interests will not defeat a recovery of damages by the client.

APPEAL from a judgment of the circuit court for Sheboygan county: W. J. TURNER, Judge. *Affirmed.*

The complaint in this action alleges in substance that the plaintiff employed the defendant to obtain a divorce for her from her husband, George Miller, and to recover a sum of money; that in such action judgment for divorce was rendered and said Miller required to pay plaintiff $3,500. The complaint further alleges that, although $14,000 in money and notes belonging to said George Miller came into the hands of the defendant, he negligently failed to collect the judgment out of the same; that as a direct result of the negligence, unskilfulness, and indifference of the defendant in not securing payment from said Miller, the plaintiff has been and is unable to satisfy said judgment; and that said Miller is and for some time has been insolvent and will never be able to satisfy the judgment. Many other facts are alleged in the complaint tending to show the negligent and unskilful manner in which the defendant performed his duties while attorney for plaintiff, in consequence of which she sustained the damages claimed. The defendant answered by way of denials and admissions, and the case was tried before a jury. The jury returned the following verdict:

"(1) Did the defendant, *Prescott,* act in good faith in the course which he pursued in the honest belief that he was acting for the best interest of his client, *Mrs. Miller?* *A.* No.

"(2) Was the plaintiff informed by the defendant that ar-

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rangement for sale of Rexine stock between Miller and Kaufman would not be carried out by Miller unless he should be paid the $6,500 remaining? *A.* No.

"(3) Was there an agreement between the plaintiff and defendant at the time the plaintiff received the $500 that she should receive the balance of $3,500 when it was paid and out of the notes held by the defendant, *Prescott?* *A.* No.

"(4) Did the defendant explain the whole transaction to the plaintiff of the sale of the Rexine stock by Miller to Kaufman, the manner of payment, and the disposition that was to be made of the notes and money received? *A.* No.

"(5) Did the defendant, *Prescott,* act with reasonable knowledge and skill in the transaction of the plaintiff's business intrusted to him as an attorney? *A.* No.

"(6) If you answer the last question 'No,' then answer: Was the failure to exercise such knowledge and skill the proximate cause of damage to the plaintiff? *A.* Yes."

Judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

Francis Williams, for the appellant.

For the respondent there was a brief by *Collins & Collins,* and oral argument by *W. B. Collins.*

KERWIN, J. The main question presented upon this appeal is whether the verdict is supported by the evidence. Under the established rule of this court, if there is any credible evidence to support the verdict it cannot be disturbed.

We do not regard the finding of the jury upon the first question of the special verdict respecting the good faith of the defendant necessary to support the judgment, therefore do not determine whether such finding is supported by the evidence or not.

All other findings of the special verdict are supported by the evidence, therefore the judgment must be affirmed.

Complaint is made by counsel for appellant of remarks made by the judge below upon the trial. We find no prejudicial error in this regard.

By the Court.—The judgment is affirmed.

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KRUECK, Respondent, vs. PHOENIX CHAIR COMPANY, Appellant.

April 14—May 1, 1914.

Statutes: Repeal by implication: Construction: Master and servant: Injury to servant: Duty to guard saws: Practicability: Questions for jury: Evidence: Contributory negligence.

1. Repeals by implication are not favored, and where there is nothing inconsistent or conflicting in the statutes in question there is no repeal by implication.
2. Sec. 1636*j*, as amended by ch. 470, Laws of 1911, which required that saws so located as to be dangerous to employees in the discharge of their duties be securely guarded or fenced, was not impliedly repealed by ch. 485, Laws of 1911, requiring the employer to furnish to his employees a place of employment as free from danger as the nature of the employment will reasonably permit.
3. Although under said sec. 1636*j* the duty to guard is absolute and the exercise of ordinary care on the part of the employer cannot be deemed a compliance with such absolute duty, yet that statute is not to be construed to require such guarding of a machine as would prevent its operation, or the abandonment of it in case it cannot be securely guarded. The true meaning and intent of the statute is that the appliances shall be guarded or fenced as safely and securely as is possible consistent with their continued practical use.
4. Mere difficulty, or inconvenience, or impracticability falling short of preventing the practical operation of a machine, however, is not sufficient excuse for failure to comply with the statutory duty.
5. Whether or not it is possible to cover a circular saw so as not to interfere with its practical operation and at the same time so as to prevent the injury sustained, must in most cases be a question of fact for the jury.
6. For this reason, in an action for an injury sustained in operating a circular saw used for cutting grooves in chair backs, it was error to exclude the testimony of a deputy of the industrial commission who qualified as an expert, to the effect that the saw in question had been examined by himself and other members of a committee appointed by the commission who had come to the conclusion that the saw could not be guarded and had made an order by which circular saws were excepted from the requirement of guarding while doing specific work which it would be impossible to do when the saw was guarded.

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7. There being nothing incredible or impossible in plaintiff's testimony that the accident occurred by reason of the lever which held the chair back in position escaping from the ratchet post in which it was fastened and flying upward, throwing his hand against the cutting edge of the saw, the question of his contributory negligence was for the jury.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

On October 10, 1912, the plaintiff was injured while in the employment of defendant operating a grooving saw. A special verdict found: (1) the unguarded groove saw which injured the plaintiff's hand was so located as to be dangerous to him in discharging the duty of his employment which he was performing when he was injured; (2) defendant's failure to guard the saw was a proximate cause of the plaintiff's injury; (3) the rubber bumper which a lever pressed down on the chair backs to hold them in place while being grooved by the saws was at the time of the plaintiff's injury in such a condition as to permit the lever and chair backs to become loose while the machine was in operation; (4) the condition last mentioned existed during such length of time prior to the injury that the defendant, in the exercise of ordinary care and diligence, should have learned of it and remedied the same; (5) failure to remedy this was a proximate cause of the plaintiff's injury; (6) there was not on the part of the plaintiff any want of ordinary care which contributed to cause the injury.

The appellant assigns error: (1) the denial of its motion to direct a verdict in its favor. This includes several minor assignments of error. (2) Also the refusal of the court to submit to the jury a question as follows: "Could the defendant's grooving saw on which the plaintiff was injured be used for the work being done at the time he was injured if guarded?" (3) A ruling was made with reference to an order of the industrial commission requiring the guarding of

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circular saws except while specific work was being done where it was impossible to do the work when the saw was guarded. A ruling was made excluding the testimony of the witness Kaems, a deputy of the industrial commission, who qualified as an expert and who testified that the saw in question had been examined by himself and other members of a committee appointed by the industrial commission who had come to the conclusion that the saw could not be guarded and had made the order above referred to. (4) An instruction was given to the jury as follows:

"There is some testimony in this case to the effect that because of the construction of this machine, and the nature of the work which it does, and the way in which it performs that work, it cannot be operated with a guard upon or over the saws other or further than the protection which is now afforded by the other parts of the machine and by the chair back when placed on the carriage. If that be the fact, it does not change nor affect the answer which you should give to this first question. The question does not ask you to say or to consider whether it is or is not practicable or feasible to operate the machine without a guard upon it, nor whether any guard can or cannot be devised which can be used on the machine without materially impairing its efficiency or working capacity."

The following instruction was requested by the defendant and refused:

"You are instructed that if it was impossible to do the work of grooving chair backs on defendant's grooving saw machine as plaintiff was doing at the time of his injury, when the saw on said machine was guarded, then the defendant was not required by law to guard said saw."

It was practically conceded that there was no sufficient evidence to sustain the third finding of the special verdict.

There was testimony tending to show that the chair back which plaintiff was engaged in grooving was clamped down upon a carriage moving in an arc over the top of the saw

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which cut a groove in the under side thereof while the carriage was being pushed away from the operator. When the carriage was pushed to the farther end of the arc a considerable portion of the saw was exposed in front of the body of the operator. The carriage was then pulled back toward him by the operator holding the lever handle with his right and the chair back with his left hand and the chair back removed and another placed in the carriage. The chair back was held or clamped on the carriage by means of a lever hinged at the end farthest from the operator, having a handle on the near end and running parallel with the flat surface of the saw over the saw and carriage and about three inches to the right of the saw. This lever had a rubber block or pad about the middle, and there was an upright post on that part of the carriage nearest the operator, having a notch or ratchet edge, and into this the lever was hooked when pressed down upon the chair back. The chair back was held in place by projecting lugs to prevent lateral movement and by the rubber block on the lower side of the said lever pressing on the upper side of the chair back to prevent upward displacement. When by reason of lesser convexity in the chair back the rubber block would not, with the lever down to the lowest notch, reach down far enough to press and hold the chair back in position, a wedge was placed between the lower end of the rubber block and the chair back. During this operation upon a chair back fastened in the manner described, the plaintiff, after pushing the carriage away from him and thereby making the desired groove in the under side of the chair back, began to pull the carriage back toward him, when the lever escaped from the ratchet notch, and plaintiff's right hand, with which he had been pulling the carriage back by the lever handle, was unintentionally moved to the left a few inches and came in contact with the upper cutting edge of the saw, causing the injury complained of.

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For the appellant there was a brief by *Williams & Stern,* and oral argument by *Burdette Williams.*

Simon Gillen, for the respondent.

TIMLIN, J. At the threshold of this inquiry some doubt is suggested with reference to what statutes apply to the case, although appellant contends that under either statute it was entitled to a directed verdict. It is argued that sec. 1636*j*, Stats., as amended by ch. 470, Laws of 1911, approved June 28, 1911, published June 29, 1911, was repealed by implication by ch. 485, Laws of 1911, approved and published June 30, 1911. Repeals by implication are not favored. Where there is nothing inconsistent or conflicting in the statutes in question there is no repeal by implication. *Att'y Gen. ex rel. Taylor v. Brown,* 1 Wis. 513. Sec. 1636*j* has been construed as not requiring such fencing or guarding as would prevent the practical operation of the machine. *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839; *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *Willette v. Rhinelander P. Co.* 145 Wis. 537, 555, 130 N. W. 853; *Adams v. Menasha P. Co.* 154 Wis. 577, 583, 143 N. W. 658; *Montevilla v. Northern F. Co.* 153 Wis. 292, 295, 141 N. W. 279. The two cases first above cited are somewhat criticised in *Willette v. Rhinelander P. Co., supra,* but that opinion must be read with reference to the statute as it then existed and with reference to the particular appliance there under consideration. In *Willette v. Rhinelander P. Co., supra,* it is also said: "Of course, a machine must be kept sufficiently open so the work can practicably be done for which it was designed. . . . Otherwise operations by machinery would be practicably impossible." Page 555.

Premising that under the statute as it read when this injury occurred the duty to guard or protect is absolute; and that the exercise of ordinary care on the part of the employer cannot be deemed a compliance with such absolute duty, yet

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the statute is not to be construed to require the performance of that which is impossible. A mandate to guard, fence, or protect an appliance in use assumes the continued use of that appliance. The imposition of an absolute duty to guard is not the same as the imposition of a duty to guard absolutely. If it be said that the employer must, in order to comply with this statute, wholly discard any appliance of the class mentioned which cannot be securely guarded or fenced, or that he must forego their use altogether, that is, we think, deriving from the statute a consequence not contemplated. The statute, sec. 1636*j*, contemplates the continued use of the described appliance, but of course guarded, fenced, or protected. It therefore means that the appliances shall be guarded or fenced as safely and securely as is possible consistent with the continued practical use of such appliances. This does not mean that the employer may insist on some particular form or style of machine, which particular form or style it is impossible to guard, when machines of a similar nature and capable of efficiently performing the same function may be had which it is perfectly feasible to guard; but (for illustration) the employer is not obliged to discontinue the use of circular saws because it might be impossible to place a stationary guard over the cutting edge thereof, although it might be his duty, when practical, to adopt as a guard the ordinary disappearing saw. In other words, the duty to guard might carry with it the duty to change the setting or frame of the saw so as to make a guard possible and practicable. In *Besnys v. Herman Zohrlaut L. Co., ante,* p. 203, 147 N. W. 37, the appliance could be guarded and still be operated. Mere difficulty, or inconvenience, or impracticability falling short of preventing the practical operation of the machine, is not sufficient excuse for failure to comply with the statutory duty. *Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853.

Ch. 485, Laws of 1911 (secs. 2394—41 to 2394—71, Stats.), requires the employer to furnish to his employees a

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place of employment as free from danger as the nature of the employment will reasonably permit. This is not contradictory of or in conflict with sec. 1636*j* as construed by this court, and, applying ch. 485, *supra,* the industrial commission made a general order to the effect that all circular saws must be guarded, etc., except while specific work is being done, where it is impossible to do the work when the saw is guarded. There is therefore no inconsistency between these statutes; one is specific and the other is general, but covering cases which might come under both with like effect so far as the instant case is affected. Whether ch. 485, *supra,* has in some other aspects a broader scope need not be decided. Whether it is possible to cover a saw so as not to interfere with its practical operation and at the same time so as to prevent the injury sustained, must in most cases be a question of fact. In the instant case appellant's counsel argues that the impossibility of so doing is apparent, while respondent's counsel in argument proposes an ingenious plan of guarding which he considers perfectly feasible. The fact that respondent's counsel felt it necessary to make such argument is a subconscious impeachment of the judgment he is endeavoring to support. Expert investigation might weaken or destroy either claim. Unless the defendant failed in its duty to guard the saw in question, no negligent act or omission creating liability for this injury appears. It seems quite manifest that the judgment appealed from cannot be supported because of the ruling excluding the testimony of the witness Kaems and because of the given instruction quoted and the requested instruction quoted and denied, unless we are prepared to say it appears clearly that the saw could have been guarded or protected without preventing its practical use, and therefore these rulings were not prejudicial. We are not prepared to say this. Neither could we uphold the request to direct a verdict for defendant unless it appeared clearly that the saw could not have been guarded or protected without preventing

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its practical use. Neither of these conditions is conclusively established.

The questions for trial on this point were: (1) whether the saw was so located as to be dangerous to employees in the discharge of their duty; (2) whether it was securely guarded or fenced, considering the form of the carriage, the exposure or nonexposure of the saw, and the covering position of the chair back; (3) whether it was possible to further guard or fence the saw as to prevent injuries similar to that received by plaintiff without at the same time preventing the practical operations of the saw. There was therefore error in excluding the testimony of the witness Kaems, in giving the quoted instruction, and in the refusal to give the requested quoted instruction. The ruling excluding the testimony of the witnesses Wolff and Van de Loo rests upon a different ground. The testimony sought to be elicited from these witnesses went not to the impossibility of furnishing a guard or protection which would permit the saw to be used and at the same time protect the plaintiff, but to the question of defendant's negligence in not furnishing a guard. This last is a defense barred by the statute in force governing this case, and the exclusion of this testimony must be upheld.

With reference to the alleged contributory negligence of the plaintiff, it must be borne in mind that the assumption of risk is by statute eliminated and that the burden of proof is upon the defendant to establish contributory negligence. What act, fact, or circumstance constituted contributory negligence in the instant case is quite difficult to specify. The argument of appellant's counsel on this point is not very explicit. As we understand it, he assumes on this point that the accident occurred as claimed by the plaintiff. This, for obvious reasons, he must do as a basis for such argument by which he assumes to raise a question of law. Second, that the plaintiff admitted to others that the accident was due to having dropped the chair back while in the act of turning

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around to place it in the finished pile and that he involuntarily grabbed for it, and so got his hand on the top of the saw. This last is not the testimony of the plaintiff, and this is not shown by uncontroverted evidence. The testimony of the plaintiff tends to show that in drawing back the carriage, with his right hand grasping the handle forming the end of the lever in question, the lever escaped from the ratchet post. He says:

"When I pulled him back and I pulled the carriage back as far as the back touched the saw, then the handle came open, the lever came open and my hand flew on the side and into the saw. The lever flew open upward, I can't say how far, but flew upward and threw my hand upward on the side and my hand flew in the saw, the right hand."

We find nothing incredible or impossible in this statement. The probability of such accidents happening no doubt gave rise to the requirement that a circular saw should be guarded or fenced.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARNES, J. (*dissenting*). Sec. 1636*j*, Stats., provided that "All saws . . . which are so located as to be dangerous to employees in the discharge of their duty shall be securely guarded or fenced." Ch. 396, Laws of 1911, which is now a part of sec. 1636*jj*, provides that "the duty to guard . . . in the manner required . . . shall be *absolute*. The exercise of ordinary care on the part of the employer shall not be deemed a compliance with such duties."

The learned circuit judge thought that, inasmuch as this saw was admittedly unguarded and located so as to be dangerous, it was immaterial whether or not there was any way in which it could be guarded, and that liability followed from its use if an injury proximately resulted from such use. I think the circuit judge was right in his position, and that it

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is supported not only by the plain and unequivocal meaning of the language quoted, but also by the decisions of this court.

By the opinion of the court the 1911 law is made to read that the duty to guard *shall be absolute if it is practicable to guard and still use the device.* In other words, an absolute duty is held to mean a conditional one. I think the exception written into the law by judicial construction is unwarranted and that the statute means what it says, and that if it is desirable to amend it the work should be left to the legislature. It was in fact rendered obsolete by the repeal of sec. 1636*j* in 1913, but this is no reason why those who were injured while it was in force should not have the benefit of it.

If it was the purpose of the legislature to prohibit the employer from using any saw unless it could be securely guarded, I do not know of a more appropriate word in the English language to use than the word "absolute." It admits of no exception. It is synonymous with "unconditional," "unlimited," "infallible," and "peremptory." Webster's Dict.; Cent. Dict.; Standard Dict. The definition given by lexicographers and that by the courts is the same. "Absolute" means "unrestricted," "unconditional." *Columbia W. P. Co. v. Columbia E. S. St. R., L. & P. Co.* 172 U. S. 475, 19 Sup. Ct. 247. Not capable of being changed or defeated by any condition, restriction, or limitation. *Falconer v. B. & J. R. Co.* 69 N. Y. 491, 498. Not contingent or conditional. *German F. I. Co. v. Stewart,* 13 Ind. App. 627, 42 N. E. 286, 289; *Wooddy v. Old Dominion Ins. Co.* 31 Gratt. 362, 375. Complete, unconditional, and unlimited. *Johnson's Adm'r v. Johnson,* 32 Ala. 637, 640. Freed or loosed from any limitation or condition. *People v. Ferry,* 84 Cal. 31, 24 Pac. 33; *Wilson v. White,* 133 Ind. 614, 33 N. E. 361. *Without limitation unless limitation is expressly made. Rosholt v. Worden-Allen Co.* 155 Wis. 168, 176, 177, 144 N. W. 650. The statute itself was drawn by a person whose

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ability to use the English language so as to accurately and correctly express the thought intended to be conveyed is not excelled by that of many present-day writers.

This 1911 statute was passed to change the rule adopted in a line of cases beginning with *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, and ending with *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992, decided in December, 1910, a short time before the amendment was passed. *Rosholt v. Worden-Allen Co., supra; Hilsenhoff v. Fass,* 155 Wis. 628, 145 N. W. 198.

Sec. 1636*j* was originally enacted in 1887. It simply required certain safeguards to be adopted and prescribed a penalty for failure to comply with such requirements. How far it affected the civil liability of employers was a mooted question. Twenty-four years after the act was passed it was thought it had not been construed so as to carry out the legislative intent, or else that conditions had changed so as to demand that the law be made more drastic. The latter supposition is probably the more correct one, as the legislature was in session when the *Guinard Case* was decided, and neither then nor during the six succeeding sessions was any attempt made to change the rule of that case. Be this as it may, the legislature of 1911 had the decision of the court before it, as well as the views of the minority of the court as expressed in the dissenting opinion, and concluded that inasmuch as the law did not accord with the views of the minority it should be changed so as to do so.

Ch. 485, Laws of 1911, was introduced in the legislature March 22, 1911. It required every employer to furnish as safe a place to work in as the nature of the employment would reasonably permit.

Ch. 396 was not introduced until April 19th. It made the duty to guard saws and some other machinery absolute. These two acts were carried along and considered at the same time. Ch. 396 was published on June 20th, and ch. 485 ten

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days later. It is apparent that as to the appliances covered by ch. 396 it was intended to impose greater obligations on the employer than were imposed by the proposed law applying to occupations generally, which is now ch. 485. One imposed an absolute duty to guard certain machinery; the other required the place of employment to be made as safe as its nature would reasonably permit. Under the construction now placed on ch. 396, it means no more than does ch. 485, and the act was wholly useless.

Construing sec. 1636—81, which is not as mandatory in its terms as is sec. 1636*jj*, in the *Koepp Case* (*Koepp v. Nat. E. & S. Co.*), 151 Wis. 302, 313, 139 N. W. 179, the court said the statute made the employers "absolute insurers," except as against assumption of risk and contributory negligence. This language is in substance repeated in *Van Dinter v. Worden-Allen Co.* 153 Wis. 533, 543, 138 N. W. 1016, 142 N. W. 122, and in *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 176, 177, 144 N. W. 650, it is said, "the word *absolute,* as used in these decisions, must mean *without limitation unless limitation is expressly made.*" There is no limitation expressed in sec. 1636*jj*.

The plain language of the statute itself and the plain language of our decisions is against the construction adopted by the court.

To the well informed person making a retrospective survey of our decisions a few years hence, the present one will I think be regarded as being more narrow and technical than was the decision in the *Guinard Case.*

Ch. 396 was not passed for the benefit of the employer, and his needs did not particularly concern the legislature. As was suggested in the dissenting opinion in the case referred to, it was passed "to lessen the annual slaughter of employees engaged in manufacturing industries." That opinion was perhaps calculated to induce the legislature to go to extreme lengths, but the purpose of the amendment was surely laud-

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able, and nothing should be done to hamstring the act so as to defeat that purpose.

It is improbable that there was a single member of the 1911 legislature who had not seen saws in operation many times. Individually and collectively they knew that the cutting edge of a saw could not be securely guarded and used at the same time. A saw so exposed as to cut an inch board will cut off a man's finger. One that will cut a stick of cord wood will cut off a man's arm, and one that will cut a saw log will cut a man's body in twain. Knowing these facts, as we must assume the legislature did, the exception now incorporated in the decision was not incorporated in the law. The tendency of the court has been to construe these safety laws so that the employee will get all the benefit from them that the legislature intended, and I know of no reason why we should single this one out for different treatment.

The legislature has plainly said to employers: You must guard your saws. If you cannot or do not do so, you become insurers of the safety of employees working around them, and liable for injury caused thereby, unless the injured party is guilty of contributory negligence. There is nothing remarkable about this statute, considering the state of public opinion when it was passed. The Workmen's Compensation Act (ch. 50, Laws of 1911) had become a law seven weeks before ch. 396 was passed. In it the legislature went as far as it was deemed safe from a constitutional standpoint in the direction of compelling employers generally to become insurers. Ch. 396 related to extrahazardous machinery, and it was no doubt thought that the state in the exercise of its police power might go to the extent of prohibiting the use of such machinery entirely or of making the employer an insurer as to injuries caused thereby.

Sec. 1636*j*, read in connection with sec. 1636*jj* as amended in 1911, is almost identical in language with sec. 1636—131, also enacted in 1911, in so far as the duty to guard dangerous

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machinery is involved. I think it would be no defense for a manufacturer of cornshredders to say that a machine could not be built which would comply with the requirements of sec. 1636—131. I do not think it was so considered when *Derouso v. International H. Co., ante,* p. 32, 145 N. W. 771, was decided. I read the statute and that case as meaning that if the machine provided for cannot be built, the manufacturer must not sell such a machine in Wisconsin, and that if he does so and injury proximately results from the use of the machine the manufacturer is liable. I may be wrong about the meaning of this statute, but I think not. If not, I do not think language applicable to an employee in a manufacturing establishment can have a different meaning from similar language when applied to a farm laborer.

The cases cited in the opinion were decided before the 1911 statute was passed, and do not affect the situation. In the *Willette Case* (*Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853), cited in the opinion of the court, it is expressly stated that sec. 1636*j* "does not create a rule of absolute liability." Page 542. In that case, too, stress is laid on the wording of sec. 1636*jj* as it then stood, and it is said that the section clearly indicated that it was not the intention of the legislature to lay down a rule of absolute duty or liability. Pages 549, 550. Less than four months after the decision was made, however, the legislature, in no uncertain terms, made the duty imposed by sec. 1636*j* absolute, by the enactment of the amendment to sec. 1636*jj* referred to. As I read the concurring opinion in the *Willette Case,* it holds that liability follows as a matter of course when it is shown that a gearing was so located as to be dangerous to employees in the discharge of their duties, that it was unguarded, that the failure to guard was the proximate cause of the injury, and that the employee was not guilty of contributory negligence. Page 570. I do not cite this as being the law of the case, but I do cite it as indicating what the legislature de-

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sired the law should be. I do not think a mandate to guard an appliance assumes the continued use of it. I think it here means that if you use such an appliance you must guard it. It may be impossible to guard a machine, but it is not impossible to discontinue its use.

ATHANASIOU, by guardian *ad litem*, Respondent, vs. GARTON TOY COMPANY, Appellant.

April 14—May 1, 1914.

Master and servant: Elevators: Negligent maintenance: Injury to servant: Contributory negligence: Special verdict: Harmless errors: Instructions to jury: Excessive damages.

1. In an action for injuries to an employee in a toy factory—upon evidence showing, among other things, that he was a Greek, nineteen years old, not long in this country, of average intelligence, but not familiar with the construction and operation of elevators; that he had not been instructed how to use the elevator or warned of any danger; that, with a truck load of materials which he had been ordered to move from one floor to another by the elevator, he came to the opening in the shaft and, there being no bell to call the operator and no tell-tale chains or other means of telling where the elevator was, put his head over the gate and was immediately struck by the elevator descending upon him; and that the gate was less than four feet high, instead of five and one-half feet as required by an order of the industrial commission,—the question of his contributory negligence is *held* to have been one for the jury.
2. Where certain of the findings in a special verdict are sufficient to support the judgment, alleged errors relating to other findings are immaterial.
3. Defendant's negligence being conceded, the fact that the court answered the question relating thereto in the special verdict did not constitute error on the ground that such answer indicated to the jury that they should find plaintiff not guilty of contributory negligence.
4. Defining correctly, in the charge, a word used in a question of the special verdict, so as to inform the jury of the true meaning of

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such question, is not error even though it informs the jury of the effect of their answer to the question.

5. In charging the jury upon the question of contributory negligence it is proper to call their attention to the concrete situation and to instruct them to take into consideration all the facts and circumstances disclosed by the evidence, including plaintiff's specific conduct. The charge upon that subject in this case, though not strictly accurate, is *held* not to have been misleading.

6. Plaintiff having, as the result of his injury, lost the sense of hearing in one ear and partially in the other, had ten teeth and part of one jaw knocked out, and the septum of the nose crowded to one side so as to totally close one opening, and having been unconscious for a long time, in the hospital for twenty-two days, and subject since to spells of dizziness when working, an award of $5,000 was not excessive.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for personal injury. Plaintiff was employed in defendant's toy factory, a four-story building about 200 feet long and 60 or 70 feet wide, in the northeast corner of which was a freight elevator that served all the floors in the factory building and also a warehouse to the east separated from it by a partition wall, the floors of which were on a higher level than those of the factory by two feet eight inches. The elevator was in charge of an operator. The entire third floor of the factory was used as a paint and varnish shop, the fourth floor as a shipping room. There was a doorway in the partition wall between the paint shop and the third floor of the warehouse sixteen feet south of the elevator shaft with a flight of three or four steps leading from the paint shop to the third floor of the warehouse, but this doorway did not serve for the transfer of goods between paint shop and warehouse. That was done by means of the elevator. On the paint-shop side of the elevator the opening into the elevator shaft was seven feet one inch high and five feet five inches wide, protected by a slat gate that could be raised and lowered. The opening on the warehouse side of the shaft at the third floor was six feet

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eleven and one-quarter inches high and six feet one inch wide, protected by a semi-automatic slat gate three feet eleven inches high. The gate was raised by hand by the operator of the elevator when it reached the floor, caught at the top, and remained up when the elevator was stationary. When the elevator moved up or down the gate came down. On the paint-shop side of the elevator there was a bell to call the operator, but none on the warehouse side. The elevator shaft was well lighted. There was also another elevator on the north wall, about fifty feet west of the one described, on which most of the material for the paint shop was brought on trucks and distributed to the workmen, and near it was a faucet used by the employees for drinking and washing purposes. The material was taken out of the paint shop by the elevator in the northeast corner of the room, and during the time plaintiff worked therein from July 12 to August 6, 1912, from seventy-five to one hundred truck loads were daily moved out of the paint shop. Plaintiff did various work in the paint shop, such as dipping toys and painting boards, and worked most of the time within seventy or seventy-five feet of the northeast elevator and about thirty feet from the east wall of the paint shop.

On the 6th day of August plaintiff was directed by the assistant foreman to go to the warehouse for a truck of material and take it into the paint shop by means of the elevator. He went into the warehouse, took the truck of material to the elevator shaft, looked over the gate to see if the elevator was down, when it descended upon him inflicting the injuries complained of. The elevator had no tell-tale chains. The first question of the special verdict was:

"Considering that at the time when plaintiff was injured by defendant's elevator, it had no tell-tale chains thereon and its gate was only three feet and eleven inches in height, was it negligence amounting to want of ordinary care on defendant's part to direct the plaintiff to use the elevator at that time to move a truck from one part of defendant's factory to another part of it?"

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This question the court answered in the affirmative. The jury found (2) that the injury which the plaintiff received was the natural and probable consequence of the negligence which is specified in the first question; (3) that defendant's proper representative should reasonably have foreseen before plaintiff was injured that the operation of the elevator without said chains, and with a gate of the height above stated, would probably cause injury to some employee of defendant performing a duty of his employment; (4) that defendant failed to properly and sufficiently instruct plaintiff how to use the elevator in such a way as to avoid the danger that it might descend upon his head and injure him; (5) that defendant's failure to properly and sufficiently instruct plaintiff how to use the elevator was negligence amounting to want of ordinary care on defendant's part; (6) that the negligence specified in the fifth question was a proximate cause of plaintiff's injury; (7) that there was no failure on plaintiff's part to exercise ordinary care which contributed to cause his injury; (8) damages $5,000.

Upon the special verdict judgment was entered in favor of the plaintiff, and the defendant appealed.

For the appellant there was a brief by *Williams & Stern,* and oral argument by *Burdette Williams.* To the point that one who projects his head or body into an elevator shaft and is injured is guilty of contributory negligence, they cited *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Knapp v. Jones,* 50 Neb. 490, 70 N. W. 19; *Guichard v. New,* 9 App. Div. 485, 41 N. Y. Supp. 456; *Murphy v. Webster,* 151 Mass. 121, 23 N. E. 842; *S. C.* 156 Mass. 48, 30 N. E. 88; *Ramsdell v. Jordan,* 168 Mass. 505, 47 N. E. 244; *Mau v. Morse,* 3 Colo. App. 359, 33 Pac. 283; *Clancy v. Guaranty Construction Co.* 25 App. Div. 355, 50 N. Y. Supp. 800; *Cowen v. Kirby,* 180 Mass. 504, 62 N. E. 968; *Roberts v. Sanitas Nut Food Co.* 142 Mich. 589, 106 N. W. 68.

Charles Voigt, for the respondent.

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VINJE, J. The question whether the evidence sustains the finding of the jury exonerating the plaintiff from contributory negligence is the most serious one raised by the defendant. Its own negligence in having in operation an elevator failing to comply with order No. 401 of the industrial commission requiring either a gate five and one-half feet in height or in lieu of that a gate not less than three and one-half feet in height and tell-tale chains is admitted. In considering the question of plaintiff's contributory negligence it must be assumed that he knew in a general way the use of the elevator and how it operated, or at least the obvious physical facts attendant upon its operation. He knew that it went up and down carrying freight on a platform; that it had a person to operate it; that it could be stopped at the different floors for the receiving or discharging of freight; and that it had no bell on the warehouse side to call the operator. He was a Greek about nineteen years of age who had been in this country only since July 10, 1912, but apparently endowed with ordinary intelligence. He had never operated the elevator, nor ridden upon this or other elevators before. He did not know its mechanical construction nor by what means it was operated. When directed by the assistant foreman to get a truck of material from the warehouse he knew it had to be brought to the paint shop by means of the elevator. He brought the truck with the material on it to the elevator shaft in the warehouse, and not seeing the elevator there, and there being no bell to call the operator, he put his head over the gate and looked down to see if it was below, and was immediately injured by the elevator descending upon him. This in substance is his evidence as to how he was injured and there is nothing to contradict it. He claims he was not instructed how to use it, or warned of any danger, and the jury so found. Of course it is perfectly easy to suggest, as defendant's counsel does, several ways in which he might have ascertained where the elevator was without putting his head over the gate

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to look down the shaft. But that was a natural thing to do, though undoubtedly dangerous and known to be so to one whose attention had ever been directed to the manner in which the elevator operated and the power required to operate it. Undoubtedly the two main considerations that moved the industrial commission to require a gate five feet and a half high or tell-tale chains with a lower gate was an appreciation of the fact that persons about elevators would be likely almost involuntarily to put their heads into the shaft to look for it, even though they might know and appreciate the risk. The impulsive tendency to do so was evidenced by the frequency of such accidents, and hence the necessity of guarding against them by more than a mere knowledge of the risk, by providing for higher gates or tell-tale chains. In view of these considerations and the inexperience and age of the plaintiff, we have reached the conclusion that the evidence sustains the finding of the jury as to his freedom from contributory negligence. A number of cases from other jurisdictions are cited in defendant's brief wherein it has been held as matter of law that a person was guilty of contributory negligence in looking into an elevator shaft as plaintiff did. They all, however, differ more or less in the facts characterizing the conduct, and furnish no safe criteria to follow were the court inclined to rely upon precedent alone.

An inspection of the special verdict will show that the answers to questions 1, 2, and 7 entitled plaintiff to judgment. Alleged errors, therefore, which relate to other questions become immaterial.

An extended argument is made by defendant's counsel to the effect that it was error for the court to answer question 1, not because the answer was not in accordance with the fact, but because it indicated to the jury that a negative answer should be returned to the question relating to plaintiff's contributory negligence. We fail to see the force of the argument. Besides, if it be a conceded fact that defendant was

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negligent, then the court could properly so find even if it did affect the question of contributory negligence. In such case it would be defendant's conduct and not the court's expression thereof that affected the result.

Exception is also taken to the charge of the court defining and explaining the meaning of the word "failure" used in the seventh question, not because such definitions and explanations were incorrect, but because they informed the jury of the effect of their answer to the question. In our opinion the definitions and explanations were superfluous, because they were no simpler and plainer than the word itself. But if so, they only correctly informed the jury of the true meaning of the question—a very proper instruction to give and one no more open to the objection urged than the question itself.

Upon the question of plaintiff's contributory negligence the court instructed the jury:

"Of course you are also to consider whether he did in fact know and comprehend the danger, but in determining that, whether he did in fact know and comprehend the danger, you may consider whether, if he did know it, if it was apparent to him, if it was open and obvious to him, he would have put his head over the top of that gate and left it there till the elevator descended upon it."

The expression, "and left it there till the elevator descended upon it," might be a little misleading to one not having heard the evidence, as it might convey the idea that there was a conscious, voluntary leaving of his head in that position for a considerable length of time, whereas the testimony shows the elevator struck him immediately upon his looking into the shaft. The jury could not be misled by the statement of the court. In other respects it was proper for the court to call the jury's attention to the concrete situation. It is proper and common in instructing upon the question of contributory negligence to charge the jury to take into consideration all the facts and circumstances disclosed by the

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evidence surrounding the alleged negligent conduct. This specific conduct of the plaintiff was one of such facts which the jury had a right to consider in determining the question.

The jury awarded plaintiff $5,000 damages. He was about nineteen years old at the time he was injured. He lost his sense of hearing in one ear, and partially in the other. Eight of the front teeth in the lower jaw, together with the bone in which they were held, were knocked out; also two upper front teeth. The septum of the nose was crowded to one side, so as to totally close one opening, though this defect can be remedied by an operation. He was unconscious for a long time, remained in the hospital twenty-two days, and claimed at the time of the trial that he grew dizzy when working to any great extent. The amount of damages, approved as it is by the trial court, cannot be deemed excessive.

By the Court.—Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and another, Respondents.

April 14—May 1, 1914.

Railroads: Regulation: Milk stations: Stopping trains: Powers of railroad commission: Reasonableness of order.

1. Sec. 1801, Stats., requiring that certain passenger trains stop at all villages of 200 inhabitants, does not affect the power of the railroad commission as to the stopping of passenger trains, except in the cases which that statute specially covers.
2. An order of the railroad commission requiring a railway company to establish a milk station at a crossing and stop its morning train at that place, should not be set aside as unreasonable where twenty-three farmers residing in the vicinity petitioned for the station and there was evidence that eighty to one hundred cans of milk and cream would be handled there, and that many farmers who send their milk to a creamery in the vicinity or are compelled to haul it a long distance to the station would ship from this crossing with a considerable saving on account of the shorter haul.

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APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action brought under sec. 1797—16, Stats., to vacate an order of the *Railroad Commission* requiring the appellant railway to establish a milk station at a crossing called Omdoll's Crossing, about half way between Whitewater and Palmyra, and stop its morning train at said place. It appears that twenty-three farmers who reside in the vicinity of the crossing petitioned for the establishment of the milk station, on the ground that from 80 to 100 cans of milk and cream would be handled there and that many farmers who now send their milk to a creamery in the vicinity or are compelled to haul it a long distance to Palmyra or Whitewater would ship the same from this crossing with a considerable saving on account of the shorter haul. Evidence was introduced before the *Commission* tending to establish these facts, while evidence was introduced on the other side tending to prove that there would probably be little increase in the milk shipments and that the proposed stop would cause delay to an already overburdened train, which would necessitate changes in the points of meeting for other trains and interfere with connections for Chicago.

The *Commission,* after an examination and report on the matter by its own engineer, found that adequate service demanded the establishment of a suitable platform and the stopping of the morning train eastward at the platform for the purpose of taking on milk. The circuit court found that the order was not unlawful or unreasonable and dismissed the complaint. From this judgment the plaintiff appeals.

For the appellant there were briefs by *Sanborn & Blake,* attorneys, and *Burton Hanson, O. W. Dynes,* and *J. N. Davis,* of counsel, and oral argument by *John B. Sanborn.*

For the respondent *Railroad Commission* there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

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WINSLOW, C. J. Giving that weight to the orders of the *Railroad Commission* to which they are entitled (*Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905), the circuit court was plainly right in dismissing the complaint. It is argued (1) that by sec. 1801, Stats. (requiring that certain passenger trains stop at all villages of 200 inhabitants), the legislature has taken the subject of the stopping of passenger trains away from the jurisdiction of the *Commission,* and (2) that the order is so unreasonable that this court should condemn it.

Neither claim can be sustained. Sec. 1801 does not attempt to interfere with the powers of the *Commission* except in the cases which it specially covers, and this is not one of them. Upon the question of unreasonableness the case seems to be practically settled by the case of *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., supra,* where a similar order was sustained under circumstances rendering its reasonableness considerably more open to question than those existing here.

By the Court.—Judgment affirmed.

HEINEMAN and another, Respondents, vs. OLD NATIONAL BANK, Appellant.

April 11—May 21, 1914.

Banks and banking: Payment of deposit to third person: Negligence: Validity of receipt: Signature procured by fraud: Evidence: Competency: Burden of proof: Instructions to jury: Appeal: Prejudicial error.

1. When the validity of a written instrument is in issue it is always competent, in an action at law as well as in a suit in equity, to show that the instrument was never executed; that its signature was procured either by fraud or duress, and therefore that it never had any legal existence as a valid instrument.

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2. In an action against a bank to recover the amount of a savings deposit, defendant alleged payment and there was evidence to the effect that plaintiffs' grandson, aged nineteen, came to the bank with the savings bank book and asked to withdraw the deposit, but was told that a receipt signed by plaintiffs, or one of them, must first be delivered to the bank; that he was given a blank receipt for execution, and later in the day returned with it bearing the signature of one of the plaintiffs; that the bank, after ascertaining that the signature was genuine, paid the amount to said grandson; and that such signature was in fact obtained by the grandson by artifice, he having engaged the plaintiff who signed in conversation on the subject of writing and declared that she was so old that she could not write her name, whereupon, to prove that she could, she wrote it on the lower edge of a paper produced by him and over the greater part of which he held his hand, she having no idea that she was signing a receipt. *Held*, that the question of defendant's negligence in paying the savings deposit under the circumstances, as well as the question of the said plaintiff's negligence in signing the receipt, were for the jury. BARNES, J., dissents.
3. In such case the burden of proving by clear and satisfactory evidence the fraud by which the signature was obtained was upon the plaintiffs.
4. Where an instruction as to a material issue places upon a party a greater burden of proof than the law requires, and the answer is unfavorable to such party, the error is prejudicial.

APPEAL from a judgment of the county court of Winnebago county: FRED BEGLINGER, Judge. *Reversed.*

Action to recover the value of a bank deposit of $301. Defendant admitted that plaintiffs had made a deposit with it in its savings department, but alleged full payment of the amount deposited with interest. It appears that plaintiffs, who were husband and wife and of advanced age, on May 20, 1911, made a savings deposit of $300 with defendant, payable to either one. On July 31st one John Heineman, their grandson, aged nineteen, who lived with them, secured possession of the bank book without their knowledge, took it to the bank, and secured the money, under the circumstances disclosed in the opinion. The jury by a general verdict found for the plaintiffs, and from a judgment entered thereon the defendant appealed.

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For the appellant there was a brief by *Hooper & Hooper,* and oral argument by *Moses Hooper.*

For the respondents the cause was submitted on the brief of *Earl P. Finch.*

VINJE, J. On July 31st John Heineman, the grandson of plaintiffs, aged nineteen, came to the bank with the savings bank book and asked to withdraw the deposit. He was told that a receipt for the money signed by the plaintiffs, or one of them, must be delivered to the bank before the deposit would be paid, and was given a blank receipt for execution. Later in the day he returned with it bearing the signature of *Monica Heineman.* The bank then asked that the genuineness of the signature to the receipt be vouched for by some one known to its officers, and one E. B. Martin certified that it was genuine, whereupon the bank paid the amount of the deposit with interest to John Heineman.

The defendant, to prove payment, introduced the receipt in evidence. The court then received evidence on behalf of plaintiffs given by *Mrs. Heineman* to the effect that her signature to the receipt was obtained by fraud on the part of John Heineman; that he engaged her in conversation on the subject of writing and declared she was so old she could not write her name; that she said she could, whereupon he produced a piece of paper, held his hand over the greater part of it and told her to write her name on the lower edge where he indicated, and that she did so; that she had no idea she was signing a receipt or any other paper of any importance, but signed only to show him she was not so old as to be unable to write her name. The defendant objected to this evidence on the ground that it raised an equitable issue, namely, one of cancellation of a written instrument, which was not triable to a jury. The objection is untenable. When the validity of a written instrument is in issue it is always competent, in an action at law as well as in a suit in equity, to show that the instrument never was executed; that its signature was

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procured either by fraud or duress, and therefore that it never had any legal existence as a valid instrument. *Keller v. Ruppold,* 115 Wis. 636, 92 N. W. 364; *Aukland v. Arnold,* 131 Wis. 64, 111 N. W. 212.

A majority of the court is of the opinion that the question of defendant's negligence in paying the savings deposit under the circumstances shown by the evidence, as well as the question of the negligence of *Monica Heineman* in signing the receipt, were properly submitted to the jury. The trial court, however, in instructing the jury relative to the latter question, said:

"Upon this question as to whether *Monica Heineman* at that time did or did not exercise ordinary care and prudence the defendant bank has the burden of proof; and before you can determine or find that *Monica Heineman* failed to exercise ordinary care and prudence in placing her signature upon such order you must be satisfied of such failure on her part by a preponderance of the evidence."

This instruction was clearly erroneous. The genuineness of the signature was admitted by plaintiff. Its effect was sought to be avoided by alleging and proving that it had been obtained by fraud. It is elementary that he who alleges fraud or seeks avoidance of an instrument on the ground of fraud has the burden of proving the fraud by clear and satisfactory evidence. *Lepley v. Andersen,* 142 Wis. 668, 125 N. W. 433. We have held that where an instruction as to a material issue places upon a party a greater burden of proof than the law requires and the answer is unfavorable to such party, prejudicial error is committed (*Carle v. Nelson,* 145 Wis. 593, 130 N. W. 467), and that sec. 3072*m,* Stats. 1911, cannot save the judgment. Id. The error was peculiarly prejudicial in the present case, for the defendant was powerless to introduce evidence to dispute the story told by *Monica Heineman* as to how she was induced to sign the receipt. Had the jury been properly instructed that the burden of proof was upon the plaintiffs to satisfy the jury by clear and

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satisfactory evidence that *Monica Heineman* was free from negligence in signing the receipt, a different verdict might well have been returned.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARNES, J. (*dissenting in part*). I agree that the instruction referred to in the opinion of the court was erroneous. I think the complaint should be dismissed because the evidence failed to show any negligence on the part of the bank in paying over the money.

SIXTA and another, Appellants, vs. ONTONAGON VALLEY LAND COMPANY, Respondent.
SAME, Respondents, vs. SAME, Appellant.

April 13—May 21, 1914.

Contracts: Exclusive agency for sale of lands: Option to purchase: Conveyance and assignment by principal: Deeds: Operation and effect: Breach of contract: Waiver: Damages recoverable by agents and optionees: Avoidable consequences.

1. A contract of exclusive agency for the sale of certain lands, with an option to purchase all or any of the lands at $6 per acre, contained stipulations to the effect that all sales made by the agents must be submitted to the principal to fix the price and terms of sale, that all moneys received on approved sales, above the stipulated commission, were to be turned over to the principal, but that, in case of the agents' electing to purchase the unsold lands, all sums in excess of $6 per acre received by the principal upon the lands sold were to be credited on the purchase price of the lands which the agents elected to purchase. The principal reserved the right to sell, but at not less than $10 per acre, in which case no commission was to be paid the agents, but all sums above $6 per acre received upon such sales were to be credited upon lands they might purchase. *Held*, that these provisions showed a relation of personal confidence between the parties; that the obligation to fix the price and terms of sale was to be exercised for their mutual benefit, with-

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out interference or hindrance by others; and that a conveyance of the lands to a third person, though made subject to the contract and accompanied by an assignment thereof, introduced an interest hostile to the agents and constituted a breach of the agency part of the contract.

2. The principal also, by transferring all its pecuniary interests in the lands and by assignment of the contract, placed itself in a position adverse to the agents' interests in respect to making sales, and made it more difficult to obtain conveyances upon such sales, and this, too, constituted a breach of the contract on its part.

3. A sale by the principal of the whole tract, or the whole of the unsold lands, was within the purview of the contract, and, if made at less than $10 per acre, violated both the agency and option features of the contract; and such violation of either part of the agreement constituted a substantial breach thereof.

4. Where a deed of the lands was fully executed and delivered, the consideration paid, and the contract assigned, there was a completed sale of the lands within the meaning of the contract, notwithstanding a clause in the deed providing that it should not take effect as a transfer of the title until the expiration of the option period and that if the optionees should elect to purchase the grantee would join with the grantor in conveying to them the lands to which they might be entitled.

5. The contract having been thus breached by a sale by the principal, the agents had the right to stand on such breach, refuse to continue working under the contract, and sue for damages.

6. The fact that the agents, after the lands were conveyed by the principal, reported sales negotiated by them before such conveyance, and remitted therefor, to the principal, who thereupon turned the matter over to its grantee and notified the agents thereof, did not constitute a waiver of the breach, where the agents immediately replied that they considered the agreement abrogated and would look to the principal for damages.

7. The evidence as to the damages suffered by the agents by reason of being deprived of the right to continue selling the lands through the contract period, was vague and indefinite, and upon the record such damages were too remote and incapable of ascertainment.

8. But, the contract being an entirety and having been breached, the agents were entitled to recover all damages proximately resulting from such breach, including those based on the option feature.

9. The measure of damages for breach of an option contract is not the same as upon a contract for the sale of lands, but the op-

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tionee is entitled to recover as damages the value of the contract and to have restored to him that with which he parted for the option.

10. It appearing in this case that, through sales by the agents at more than $6 per acre, a large fund had been accumulated to their credit applicable as a payment under their option, the breach of the contract operated directly to deprive them of the right of applying this sum and consequently caused them the loss of it, and the amount thereof was recoverable as damages.

11. But, upon the principle of avoidable consequences, there could be no recovery of damages for deprivation of securing the land, where the grantee of the principal agreed with the latter to convey in case the agents should elect to purchase under their option.

APPEALS from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Modified and affirmed.*

This action is brought to recover damages for breach of a written contract by which the defendant, as owner of lands, gave the plaintiffs the exclusive agency from date of the contract, April 5, 1909, until January 1, 1911, for the sale of the lands included in the contract. The quantity of land was 17,340 acres in Ontonagon county and adjoining counties in Michigan. The defendant agreed to pay the plaintiffs a commission of $1.50 per acre upon all lands sold by them under the contract. This commission was to be deducted from the purchase moneys received on such sales, and all other purchase moneys and securities to be taken in the defendant's name were to be turned over to the defendant. It was agreed that the prices and terms of sale of lands by the plaintiffs were to be made by and subject to the approval of the defendant; and the plaintiffs were required to advertise the lands for sale at their own expense and continually endeavor to sell them, and they were to bear all the expenses of marketing the land. The defendant also gave the plaintiffs an option to purchase the lands or those remaining unsold on or at any time before January 1, 1911, at the uniform price of

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$6 per acre. It was agreed that of the moneys and the face value of securities received by the defendant upon sales made by the plaintiffs, all above $6 per acre "shall be credited to *Sixta* [*Sixta* and *Martin*] and considered a payment upon the purchase price of the lands which *Sixta* shall elect to purchase." The defendant reserved the right and was not to be prevented

"from making sales of said real estate at any time or to any person; but the *Land Company* agrees not to sell any such land for a less sum than ten ($10) dollars per acre. On sales made by the *Land Company* no commission shall be paid *Sixta,* but if he shall exercise the option hereby given him, the *Land Company* agrees to credit *Sixta* upon such purchase, all sums over and above six ($6) dollars per acre received by it upon sales made by itself."

It appears that the plaintiffs, immediately after the contract was made, commenced advertising and selling the lands, and by June, 1910, had sold 1,380 acres at an average price of $14.48 per acre.

On May 23, 1910, the defendant conveyed by statutory warranty deed all the unsold lands, being 16,360 acres, to the W. J. Hess Company at the rate of $6 per acre. This deed contained the provision:

"This conveyance is made subject to all the rights of *E. C. Sixta* and *James G. Martin* under an option and agency contract executed by them and said grantor and dated April 5, 1909, a copy of which contract has this day been delivered to said grantee and the receipt of such copy is acknowledged by the acceptance of this conveyance, and the grantee herein covenants and agrees to perform all the terms and conditions of said contract imposed on the grantor as to all lands described in this conveyance."

The plaintiffs obtained information of this conveyance June 24, 1910, and soon thereafter protested to the defendant's officers, claiming the defendant had no right to make such transfer and sale at a price of less than $10 per acre.

It also appears that the defendant, on the day of executing

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this deed to the Hess Company, made a formal assignment of this agency and option contract between the plaintiffs and the defendant, and the Hess Company agreed to perform and complete the contract as was required of the defendant; that as to the lands theretofore sold by the plaintiffs the defendant reserved the right and assumed the duty to settle and adjust the matter with the plaintiffs, and this contract of assignment stipulated that it was particularly understood and agreed between the defendant and the Hess Company that no title to the lands embraced in the deed to the Hess Company should pass to the Hess Company, and the deed should not be effectual to convey title until after the option given the plaintiffs expired and the plaintiffs refused to exercise their rights under it; and that if the plaintiffs exercised their rights under the option the Hess Company agreed to join the *Land Company* in a deed to the plaintiffs for the purpose of issuing to the plaintiffs a good title to the lands. On June 25, 1910, the Hess Company, by warranty deed in form and context like the deed from the defendant to the Hess Company, conveyed all the lands to the Ontonagon Valley Settlement Company. On June 27th the plaintiffs reported by letter to the defendant sales of parcels of land to Wallen and to Bernhardt, inclosing cash payment and terms of sale. On July 9th the defendant replied thereto, acknowledging receipt, and stated:

"As we personally advised you, we have sold our interest in the contract with you covering our Ontonagon Valley lands to the W. J. Hess Company of this city. We are advised by them that they have since transferred the land to the Ontonagon Valley Settlement Company. We have therefore turned the checks and your correspondence over to the Ontonagon Valley Settlement Company, who will give the matter their prompt attention."

The plaintiffs on August 2, 1910, replied thereto, stating that they expected the defendant to carry out its contract with them; that they had spent considerable money and time ad-

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vertising the lands and developed an interest in their sale; that they had many prospective purchasers and intended to exercise their option; that the defendant's action rendered it impossible to do anything further under the contract, and demanded that the defendant make good to them their losses resulting from the defendant's breach of the contract. The president, Lindstedt, of the defendant company, and the secretary, Mr. Nash, after the plaintiffs were informed of the Hess transfer and assignment, in conversations pertaining to these matters asserted to the plaintiffs that they could proceed and continue under their contract,—that the conveyance and assignment to the Hess Company did not affect their rights. The plaintiffs did not continue to make sales after those made to Wallen and Bernhardt, nor did they exercise their option. The defendant's officers were not applied to to fix prices or specify terms on any other sales by the plaintiffs except as shown by the transaction here involved.

The court found there was a nominal breach of the contract, but that no damages were proven as resulting from the agency part of the contract, and that only nominal damages resulted to the plaintiffs from the breach of the contract, and awarded them judgment for six cents and for their costs of action. Both parties appeal from this judgment.

For the plaintiffs there were briefs by *Hougen & Brady,* attorneys, and *P. H. Martin,* of counsel, and oral argument by *A. L. Hougen* and *P. H. Martin.* They argued, among other things, that the contract was personal and nonassignable, and was also entire and indivisible. *Johnson v. Vickers,* 139 Wis. 145, 120 N. W. 837; *Arkansas Valley S. Co. v. Belden M. Co.* 127 U. S. 379, 387, 8 Sup. Ct. 1308; *Boston Ice Co. v. Potter,* 123 Mass. 28; *Swarts v. Narragansett E. L. Co.* 26 R. I. 388, 59 Atl. 77; *Campbell v. Sumner,* 64 Kan. 376, 67 Pac. 866; *Edison v. Babka,* 111 Mich. 235, 69 N. W. 499; *Winchester v. Davis P. Co.* 67 Fed. 45; *Worden v. C. & N. W. R. Co.* 82 Iowa, 735, 48 N. W. 71; *Craig v. Miller,* 6 Ky.

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440; 4 Cyc. 22, 23; *Delaware v. Diebold S. & L. Co.* 133 U. S. 473, 10 Sup. Ct. 399, 33 L. ed. 674; *Burck v. Taylor,* 152 U. S. 634, 14 Sup. Ct. 696, 38 L. ed. 578; *American C. Co. v. Continental C. Co.* 188 U. S. 108, 23 Sup. Ct. 265, 47 L. ed. 404; *New York B. N. Co. v. Hamilton B. N. E. & P. Co.* 180 N. Y. 280, 73 N. E. 48; *Eastern A. Co. v. McGaw,* 89 Md. 72, 42 Atl. 923; *Globe & R. F. Ins. Co. v. Jones,* 129 Mich. 664, 98 N. W. 580; *Sloan v. Williams,* 138 Ill. 43, 27 N. E. 531; *Pike v. Waltham,* 168 Mass. 581, 47 N. E. 437; *Linn County A. Co. v. Beechley,* 124 Iowa, 146, 99 N. W. 702. By disposing of the lands defendant had disabled itself from performing its contract and rendered it impossible for plaintiffs to do anything further under it, and plaintiffs were entitled to treat the contract as breached and to recover damages. *Richey v. Union Cent. L. Ins. Co.* 140 Wis. 486, 122 N. W. 1030; *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 102 N. W. 593; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 4 Sup. Ct. 390; *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 97 N. W. 674.

For the defendant there were briefs by *Nash & Nash* and *Lines, Spooner, Ellis & Quarles,* and oral argument by *George Lines.* They contended, *inter alia,* that the contract with and conveyance to the Hess Company did not affect plaintiffs' contract or place the lands beyond their reach. *Sizer v. Clark,* 116 Wis. 534, 93 N. W. 539; *Sixta v. Ontonagon Valley L. Co.* 148 Wis. 186, 134 N. W. 341; *Foster v. Lowe,* 131 Wis. 54, 110 N. W. 829. The title did not pass by the Hess deed. *Jones v. Caird,* 153 Wis. 384, 141 N. W. 228; *Rowell v. Barber,* 142 Wis. 304, 125 N. W. 937; *Ferguson v. Mason,* 60 Wis. 377, 19 N. W. 420; 2 Devlin, Deeds (3d ed.) § 958. The *Sixta* contract was assignable. *New England I. Co. v. Gilbert E. R. Co.* 91 N. Y. 153; *New York B. N. Co. v. Hamilton B. N. E. & P. Co.* 180 N. Y. 280, 73 N. E. 48; *Northwestern C. & L. Co. v. Byers,* 133 Mich. 534, 95 N. W. 529; *American B. & T. Co. v. B. & O.*

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S. W. R. Co. 124 Fed. 866; *Dorr v. Alford,* 111 Iowa, 278, 82 N. W. 789; *Devlin v. Mayor,* 63 N. Y. 8; *Parsons v. Woodward,* 22 N. J. Law, 196; *Groot v. Story,* 41 Vt. 533. If it was not assignable, then the unauthorized assignment was a nullity, of which fact plaintiffs were bound to take notice. *Brush E. Co. v. California E. L. Co.* 52 Fed. 945, 964; *New England I. Co. v. Gilbert E. R. Co.* 91 N. Y. 153.

SIEBECKER, J. An examination of the contract made by the parties discloses that the plaintiffs were given the exclusive right to sell the lands as the defendant's agents, except that the defendant had the right to sell upon the terms and conditions specified. Another stipulation provided that all sales made by the plaintiffs must be submitted to the defendant to fix the price and the terms of sale, and the moneys received on the sales approved by the defendant, above the stipulated commission the plaintiffs were entitled to, were to be turned over to the defendant and all securities taken on sales were to be in defendant's name and for its benefit. These stipulations concerning the agency of the plaintiffs clearly show a relation of personal confidence and evince an intent that the right reserved to the defendant to fix prices and terms on sales made by the plaintiffs should be exercised by the defendant's officers, and that this obligation should be performed for the mutual benefit of the two parties to the contract without interference or hindrance by others. The conveyance of the lands and the assignment of the contract to the Hess Company brought a third party into the transaction, which was manifestly contrary to the understanding embodied in the agreement, and brought a party into it whose interests were clearly hostile to those of the plaintiffs and clearly tended to alienate the friendly co-operation of the defendant's officers to further the plaintiffs' rights and interests in fixing prices and terms of sales for the remainder of the time fixed by the contract. It is evident that the Hess Com-

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pany made the purchase to obtain the lands, and this in itself naturally made the Hess Company adverse to further sales by the plaintiffs. The defendant, by transferring all its pecuniary interests in the lands and by assignment of the contract, was likewise put in the position of an adverse party to the plaintiffs' interest in making sales. It also followed that, if the plaintiffs desired to perform their agency agreements, they encountered additional obstacles in securing conveyances of the defendant and of the subsequent purchaser, the Ontonagon Valley Settlement Company. That these results were the consequence of the defendant's conveyance to the Hess Company is shown by their acts when the plaintiffs demanded conveyances to Wallen and Bernhardt. The circumstances of these sales clearly show that the defendant's officers were disposed to hinder and oppose the plaintiffs in carrying out sales to purchasers they might obtain as the defendant's agents, and practically prevented the plaintiffs from making sales. In substance and effect the defendant's transfers of the lands and contract to the Hess Company put the Hess Company in the defendant's place and thereby clearly violated the agency part of the contract. But the conveyance also violates the provision of the contract by which it is agreed that the defendant should have the right of making sales at any time or to any person "upon the condition that it make no sales for a less sum than ten ($10) dollars per acre." That the defendant understood this agreement to include a sale of lands as a whole is shown by its attitude in all of its dealings with the Hess Company by attempting to so frame the transfer as to give it no efficacy as a conveyance until after the plaintiffs' contract had expired; but the form of conveyance, deeding it to the purchaser, payment of the consideration, and all other acts of the parties thereto, make the transaction a completed sale of the land to the Hess Company, subject to the condition that, if the plaintiffs elected to stand upon the contract and exercise their rights thereunder, then

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the grantee was to join in a conveyance of the lands to which the plaintiffs were entitled under either the agency or option features of the contract. We consider the conveyance to the Hess Company to be a sale within the stipulation of the contract binding the defendant not to sell any such land for a less sum than ten dollars ($10) per acre, and that such sale was in its terms a breach of this agreement. This stipulation has a twofold bearing in determining the rights and obligations of the parties to the contract: it was apparently designed to protect the plaintiffs against any sale by the defendant at a price so as to nullify the plaintiffs' efforts to establish a market for these lands at a price above the six dollars ($6) per acre at which they had an option thereon, and that all sales made by them or the defendant would produce a fund which the plaintiffs could apply on the purchase price under the option. To allow the defendant to sell the lands as it did to the Hess Company tended to nullify both of these objects. We consider that the sales to the Hess Company breached the agency and the option features of the contract, and that such violation of either part of the agreement constituted a substantial breach thereof. As declared on the former appeal of the case (148 Wis. 186, 134 N. W. 341):

"The so-called option feature of the contract cannot be separated from the commission part. Each is dependent upon the other; the covenants are mutual. The covenants of each party to the contract constitute a consideration for the covenants of the other party. The contract is an entirety. The promises are mutual and are a sufficient consideration between the parties to the contract. . . . The covenant that defendant should not sell for less than $10 per acre was for the benefit of plaintiffs, because they had an interest in all moneys received on sales above $6 per acre, in case they elected to purchase."

We think the trial court erred in holding that the acts of the defendant in conveying the land to the Hess Company constituted simply a nominal breach and did not operate to

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deprive the plaintiffs of any substantial rights under their contract. The conveyance of the land and assignment of the contract by the defendant resulted in serious and material deprivation of the plaintiffs' rights to have the friendly and personal co-operation of the defendant's officers in making sales of land, and in subjecting them to the hindrances and unjust burdens of dealing with titles to which a third and hostile party had acquired a right, and thus imposed adverse conditions which materially interfered with them in continuing their agency under the conditions provided for in the contract, and they suffered a loss of having the benefit of an accumulated fund of at least $4 per acre to enable them to exercise their option under the contract.

The contract having been thus breached, it was the plaintiffs' right to stand on the breach and waive their right of electing to continue the contract in force and demand its performance. The plaintiffs have elected to stand on the breach, and hence the contract drops out of consideration except as it is material to ascertain the consequence of its breach in determining what damages, if any, the plaintiffs suffered from such breach. The trial court awarded only nominal damages, upon the theory that the evidence failed to show that the plaintiffs suffered any damage from the breach of the agency feature of the contract, and that as to the option feature they were not deprived of any right, since the conveyance to the Hess Company provided that the plaintiffs were to have the right to purchase under the option. This seems to us a confusion of results, in that it holds that the contract is breached and also that it is in force in part. This we deem erroneous in two respects. First, because, as formerly held on appeal, the contract is entire and indivisible, and hence a breach of one part constitutes a breach of the entire contract, and the plaintiffs had the right to declare it abrogated in all respects; and secondly, a breach of the condition under which the defendant could make sales of land constituted a breach of the

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option feature of the contract and operated to abrogate it in all its obligations when the plaintiffs elected to stand on the breach. The question then is, What damages proximately resulted to the plaintiffs from the acts of the defendant in breaching this agreement? We must not lose sight of the grounds on which the plaintiffs sue to recover damages, namely, the breach of the contract, and not under the provisions of the contract.

We cannot accede to the contention of the defendant that the acts of the plaintiffs in attempting to complete the sale of parcels of land to Wallen and to Bernhardt on June 27, 1910, constitute a waiver of the breach. The sales were negotiated before they had knowledge of this conveyance, but they reported these deals to the defendant on July 12th and remitted the cash payments made thereon and requested contracts therefor. No waiver can be held to have been made, in the light of the fact that the defendant thereupon for the first time turned the matter over to its grantee and its successor in title to complete such sales and so notified the plaintiffs on July 19th; to which the plaintiffs replied on August 2d, declaring in direct terms that they regarded the contract had been abrogated by the defendant and they should look to it to make their losses good. Each of these various acts was merely part of a transaction which finally culminated in the commencement of this action to recover the damages for the alleged breach.

In determining what damages the plaintiffs are entitled to recover, the inquiry is, What does the evidence show the contract was worth to the plaintiffs when the defendant breached it, considering their rights as agents to sell these lands under its provisions and their rights as optionees to purchase the land? We find the evidence is too vague and indefinite for ascertaining with reasonable certainty what damages, if any, the plaintiffs suffered by being deprived of their right to continue selling these lands throughout the contract period.

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Whatever profits they might realize on such sales is left to rest on mere speculation, and on the record are too remote and incapable of ascertainment. The trial court so considered it and the record fully justifies this conclusion. As to the plaintiffs' damages resulting from the breach of the option to purchase these lands, the conclusion of the trial court that they were merely nominal is not sustained. As already stated, the contract was breached and the plaintiffs elected to stand on the breach, and hence all claims and contentions that no damages resulted to them because the conveyance to the Hess Company did not affect their rights and duties growing out of the option feature of the contract are not well founded if the facts proven show that the plaintiffs sustained damages proximately resulting from the breach of the contract. The nature of an option contract has a bearing on the solution of this question. What such a contract is was clearly stated in *Barnes v. Rea,* 219 Pa. St. 279, 293, 68 Atl. 836:

"An option is not a sale. It is a right of election in the party taking the same to exercise a privilege, and only when that privilege has become exercised by acceptance in the manner specified in the agreement does it become an absolute contract, binding upon both parties. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. By such an agreement he does not sell his land, nor does he at that time enter into an absolute contract to sell and convey, but he does agree to sell something; that is, the right or privilege to buy at the election or option of the party with whom the agreement is made. The optionee under such an agreement takes, not lands, nor even an absolute agreement that he shall have lands conveyed to him, but he does get something of value; that is, the right to call for a conveyance of the lands if he elects to purchase in the manner specified. . . . It is a unilateral agreement containing the terms and conditions upon which the optionor agrees to sell and convey his land not yet ripened into an absolute contract to sell and convey on one side and to purchase and pay on the other."

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The option contract, therefore, does not raise questions of damages for breach of a contract for sale of lands by the vendor, and hence the rule of damages in actions for breach of contract between vendor and vendee, where the vendee alleges a breach by the vendor which entitles the vendee to the difference between the contract price and the value of the land at the time of the breach, does not control this case. The case of *Boyd v. De Lancey,* 17 App. Div. 567, 45 N. Y. Supp. 693, involved the question of damages resulting from a breach of an option contract, and it was held that an action for damages based on a breach of an option by the optionor entitles the optionee to recover as damages the value of the contract and to have restored to him that with which the optionee has parted for the option. This rule compensates, as near as can be ascertained, the optionee for the losses resulting from an abrogation of the contract. In this case the evidence shows that the plaintiffs had earned $10,050, to be applied as payment on the option. The defendant's breach operated directly to deprive them of the benefit of applying this sum and consequently caused them the loss thereof. This item is fixed and certain, and for its loss the plaintiffs are entitled to be compensated. The plaintiffs claim the right to recover compensation for deprivation of securing the land, and assert that this is measured by the difference in the market price of the lands and their contract value. But we do not perceive how this can be a measure of such loss. They had no contract for this purchase, as heretofore shown, nor can such damage be recovered as part of the value of the contract, for it appears that under the conveyance by the defendant to the Hess Company the defendant reserved the right to convey to the plaintiffs under the option and the grantee agreed to join therein to give title to the plaintiffs, if the plaintiffs demanded a conveyance upon the terms in the option. The loss of the land, under the circumstances, is of such character that the plaintiffs might reasonably have avoided it by accept-

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ing the title to the lands from the defendant within the defendant's right under the conveyance to the Hess Company, and that they should have done so upon the principle of avoidable consequences as to resulting damages from illegal acts and which the party damaged is in justice called on to do if it can be reasonably done. Under the circumstances of the case the plaintiffs cannot be said to have been deprived of the opportunity to obtain the title to these lands if they were ready and willing to buy them upon the conditions of the option. Upon the record of the case no other elements of damages are established as the result of the breach of this contract aside from the $10,050 fund which has been accumulated by the plaintiffs for their benefit and was to be applied as payment of the option. Their right to this sum they lost as a direct consequence of defendant's violation of the contract, and they are entitled to be compensated for such loss. From this it results that the lower court erred in holding that there was merely a nominal breach of the agency and option contract which resulted in only nominal damages to the plaintiffs. We consider that there was a substantial breach of the contract by the defendant; that the plaintiffs had the right to and did stand on the breach to recover the sum of $10,050 with interest from the date action was commenced.

By the Court.—The judgment appealed from is modified on the plaintiffs' appeal by striking out the words "six cents" and inserting in lieu thereof the following: "twelve thousand three hundred and nine dollars," and as so modified is affirmed; and that the defendant have nothing on its appeal.

WINSLOW, C. J., and BARNES, J., dissent.

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STATE EX REL. ALTHEN, Appellant, vs. KLEIN, City Clerk, and others, Respondents.

April 14—May 21, 1914.

Taxation: Board of review: Changing assessor's valuation: Reviewing action of board: Agreed case: Certiorari: *Who may institute proceeding.*

1. The board of review cannot change the assessor's valuation without evidence; but if, in any reasonable view of it, the evidence furnished a substantial basis for the action of the board in making a change, and there is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts.
2. The fact that a controversy relative to a decision of the board of review was submitted to the court under sec. 2788, Stats., does not change the rule of law as to the effect that must be given to such decision, and it must be sustained in that proceeding if it would be sustained on *certiorari*.
3. Jurisdictional matters only can be reached on *certiorari*, and if on any reasonable view of the evidence it will support the conclusion arrived at, the board of review had jurisdiction to decide as it did.

[4. Whether the plaintiff (a taxpayer and the assessor who made the assessment changed by the board of review) had any right to institute a proceeding to question the validity of the action of the board, not determined.]

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

In the year 1911 the assessor of the city of Two Rivers placed a valuation of $163,500 on the personal property of the *Hamilton Manufacturing Company.* That company appeared before the board of review and objected to the assessment as being excessive and offered some testimony which it claims tended to sustain its contention. The board of review, deeming such evidence sufficient to warrant a reduction of the assessor's valuation, did in fact reduce it in the sum of $20,000. The plaintiff, who was the assessor for the city of Two Rivers in the year 1911, insisted that the reduction in

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the assessment of the personal property of the *Hamilton Manufacturing Company* made by the board of review was without warrant or authority in law and that its action was illegal and void, and demanded of the city clerk that that officer disregard the reduction in making out the tax roll, and carry the assessment of the personal property of the *Hamilton Manufacturing Company* as made by him on to the tax roll. The city clerk refused to comply with the request on the ground that it was his legal duty to make out the tax roll in accordance with the valuations as finally determined by the board of review. These facts were agreed upon, and it was further stipulated that such statement of agreed facts be submitted to the court for the purpose of determining the validity of the action of the board of review, and for the purpose of ascertaining whether the city clerk should extend on the assessment and tax roll the valuation of the property of the *Hamilton Manufacturing Company* as made by the assessor or as fixed by the board of review. The stipulation further recited that the parties agreed to be bound by the determination or judgment of the court and that they consented and agreed that whatever the court should find to be a valid and legal assessment of said property might and should be extended on the tax and assessment rolls without further action. A second stipulation was entered into which in substance recited that it would be impossible to obtain a determination of the court on the question before it would be necessary to prepare the tax roll, and it was agreed that said clerk should make up such roll, carrying out the personal property tax against the *Hamilton Manufacturing Company* on the basis of the valuation fixed by the board of review, the *Hamilton Manufacturing Company* on its part agreeing that if the court should determine the assessment of its property as made by the assessor to be the lawful assessment, it would pay to the city treasurer of the city of Two Rivers such sum as might be necessary to make the tax on its personal prop-

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erty equal to the tax which would have been assessed against it had the valuation fixed by the assessor been adopted by the board of review. Thereafter a third stipulation was entered into which was submitted to the court, to the following effect:

"That the income tax of the *Hamilton Manufacturing Company* for the year 1911 was $5,670.24. That the personal property tax of said corporation for the year 1911 was $3,373.65. That the personal property tax of said corporation for the year 1912 was $3,642.24. That in paying the personal property tax for 1912 to the city treasurer of the city of Two Rivers said treasurer offset the personal property tax for that year against the income tax for the year 1911; that the income tax of said corporation for the year 1911 was greater in amount than the personal property tax of said corporation for the said year would have been if computed on the assessment of 1911 as made by the assessor of the city of Two Rivers."

The circuit court had before it these three stipulations, the testimony taken before the board of review in 1911, and also the testimony taken before the board in the years 1909 and 1910, relating to the personal property of the *Hamilton Manufacturing Company,* reference having been made in the 1911 testimony to the evidence relating to the value of the personal property in the two former years.

The circuit court held (1) that the city clerk had no option but to make out a tax roll in accordance with the valuations as finally determined by the board of review; (2) that there was sufficient evidence before the board of review to warrant it in reducing the assessment of the personal property of the *Hamilton Manufacturing Company* as made by the assessor; (3) that nothing was offered which tended to show that the *Hamilton Manufacturing Company* was not, under the valuation made by the board of review, called upon to pay a fair, just, and equitable proportion of the taxes of the city of Two Rivers upon its personal property. (4) The court was also of the opinion that the plaintiff as a taxpayer could not maintain the action, but did not rest the judgment

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ordered on this ground. (5) The court refrained from expressing any opinion as to whether the action presented anything more than a moot case, because of the income tax assessed for the year 1911 being in excess of what the personal property tax for that year would have been if carried out on the basis of the assessor's valuation. From a judgment denying the plaintiff the relief sought he prosecutes this appeal.

The cause was submitted for the appellant on briefs signed by him and by *Gilbertson, Lehr, Reitman & Kiefer,* attorneys, and *Lehr, Kiefer & Reitman* and *J. Elmer Lehr,* of counsel, and for the respondents on that of *L. W. Ledvina* for the board of review, *Nash & Nash* for the *Hamilton Manufacturing Company,* and *E. L. Kelley,* of counsel.

BARNES, J. The board of review could not change the assessor's valuation without evidence. *State ex rel. Davis & Starr L. Co. v. Pors,* 107 Wis. 420, 430, 83 N. W. 706; *State ex rel. Giroux v. Lien,* 108 Wis. 316, 84 N. W. 422; *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566.

If in any reasonable view of it the evidence taken furnished a substantial basis for the action of the board in making the change, and there is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts. *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 562, 94 N. W. 359; *State ex rel. J. S. Stearns L. Co. v. Fisher, supra.*

If the action of the board of review should be sustained on a *certiorari* proceeding brought to review it, then it must be sustained in the present proceeding. The fact that the controversy has been submitted to the court under sec. 2788, Stats., cannot change the rule of law as to the effect that must be given to the decision of the board.

On *certiorari,* jurisdictional matters only can be reached, and the presumption is that the determination of the board is

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correct. If on any reasonable view of the evidence it will support the conclusion arrived at, the board had jurisdiction to decide as it did. *State ex rel. Miller v. Thompson,* 151 Wis. 184, 187, 188, 138 N. W. 628; *State ex rel. M. A. Hanna D. Co. v. Willcuts,* 143 Wis. 449, 453, 128 N. W. 97; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Edward Hines L. Co. v. Fisher,* 129 Wis. 57, 108 N. W. 206.

Tested by these rules, we cannot say that the evidence before the board did not furnish a substantial basis for the change made in the assessor's valuation, although it is rather weak. It is unnecessary to discuss other considerations urged in support of the judgment, and we do not wish to be understood as deciding that the plaintiff had any right to institute this proceeding.

By the Court.—Judgment affirmed.

TOLEDO COMPUTING SCALE COMPANY, Respondent, vs. POLANIS, Appellant.

May 1—May 21, 1914.

Replevin: Nonsuit: Judgment not a bar to another action: Milwaukee civil court: Appeal: New trial.

1. Where, in an action of replevin in the Milwaukee civil court, the record shows that the issues were not tried upon evidence and that judgment of dismissal was awarded on the ground that plaintiff had not proven a cause of action, such judgment constituted a nonsuit and was not a bar to another action upon the same cause.
2. Under sub. 3, sec. 28, ch. 549, Laws of 1909, where a judgment of the Milwaukee civil court is reversed by the circuit court and a new trial ordered, such trial should be had in the circuit court.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order reversing the judgment of the

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civil court of Milwaukee county and granting a new trial in a replevin action.

The plaintiff commenced a replevin action on January 25, 1912, in the civil court of Milwaukee county to recover a scale from the defendant upon an affidavit for warrant of seizure, and warrant issued. The scale in question was seized by the sheriff and held subject to the order of the court. When the case was called the court sustained a demurrer to the affidavit of the plaintiff on the ground that it did not state whether the plaintiff was an individual, copartnership, or a corporation, and upon plaintiff's motion it was granted leave to file a new affidavit. Plaintiff filed a new and sufficient affidavit, and the defendant answered that the claim of the plaintiff had been fully paid and satisfied, and further that the company was not legally authorized to do business in this state. The court thereupon ordered the company to furnish security for costs in the sum of $20, which was complied with and the case called for trial. The parties announced that they were ready for trial. At this point the record shows no witnesses were sworn or any evidence offered by either party; nor is there any record of any evidence in that case returned with the record to the circuit court. Upon defendant's motion the court, being sufficiently advised, ordered the complaint dismissed on the ground that the plaintiff had not proven its case, and awarded judgment dismissing the action with costs, as follows: "It is adjudged that the complaint of the plaintiff be dismissed and that the defendant, *John Polanis,* recover of the plaintiff, the *Toledo Computing Scale Company,* the costs of this action, taxed at $5 attorney fees."

Upon February 8th the plaintiff in the above action began another replevin action against the defendant involving the identical property and issues as the former one. When this second case was called in the civil court of Milwaukee county the defendant demurred to the affidavit on the ground that the affidavit failed to allege that the plaintiff is a corporation

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licensed to do business in the state of Wisconsin, which was overruled. The defendant then, by way of plea in bar, alleged that the identical issues and facts involved in this second action had been adjudicated in the former action. The civil court sustained this plea and dismissed the action. The plaintiff appealed to the circuit court from the judgment of the civil court sustaining the plea in bar, and the circuit court reversed the judgment and directed that a new trial be had in the circuit court. In making this order the court said:

"The court is in doubt as to the proper order that should be made in this case. If the plaintiff had offered its proof on the trial, then there is no doubt but what a new trial should be had on the record. The plaintiff offered no proof, and the defendant offered no proof excepting the record of the previous trial, so that the court is without evidence here upon which to determine the case on this appeal, and has concluded to reverse the judgment of the court below and direct that the case stand for trial in the circuit court, new evidence to be taken, with costs of this appeal to the plaintiff."

From this order the defendant appeals.

The cause was submitted for the appellant on the brief of *Casimir Gonski,* and for the respondent on that of *Carroll & Carroll.*

SIEBECKER, J. The appellant contends that the circuit court erred in reversing the judgment of dismissal of the civil court. It is claimed that the record of the proceeding of the civil court in the first action shows that a trial was had and that the court found that plaintiff had "not proven its case and that the action should therefore be dismissed," and awarded judgment accordingly. The record of the civil court omits to show that any witnesses were sworn or that any evidence was offered at the trial of the action by either party. This indicates that the parties submitted the case without producing any evidence. The court was proceeding within the

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law governing the jurisdiction of a court of a justice of the peace, and this requires that full minutes of all the evidence given at the trial of a cause shall be reduced to writing and be filed among the papers of the case. Ch. 549, Laws of 1909; sec. 3638, Stats. This record of the civil court in the first action, therefore, shows that the issues were not tried upon evidence and that judgment of dismissal was awarded upon the ground that plaintiff had not proven a cause of action. Such judgment of dismissal constitutes a nonsuit, and, the proceeding being one in replevin, it devolved on the court to assess damages for the caption and detention of the property and to make an order for its return to the defendant and adjudge that he recover his damages and costs. Sec. 3743, Stats.; *Timp v. Dockham,* 32 Wis. 146.

It has been repeatedly held that a judgment of nonsuit in an action is not a bar to another action upon the same cause. *Strehlau v. John Schroeder L. Co.* 152 Wis. 589, 142 N. W. 120; *Kaley v. Van Ostrand,* 134 Wis. 443, 114 N. W. 817. It necessarily follows that the circuit court properly held that the civil court in the instant case erred in dismissing the plaintiff's complaint upon the ground that the judgment in the first case was a bar to the prosecution of this action.

It is claimed that the circuit court improperly ordered a trial of the issues in the circuit court. This order is proper under Laws of 1909, ch. 549, sec. 28, sub. 3. *Pennsylvania C. & S. Co. v. Schmidt,* 155 Wis. 242, 144 N. W. 283; *Hanna v. C., M. & St. P. R. Co.* 156 Wis. 626, 146 N. W. 878.

By the Court.—The order appealed from is affirmed.

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WEICHMAN and another, Respondents, vs. KAST, Appellant.

May 1—May 21, 1914.

New trial: Newly discovered evidence: Diligence: Cumulative or impeaching evidence: Discretion.

1. An affidavit by defendant in support of a motion for a new trial on the ground of newly discovered evidence as to a certain conversation between the parties, stating that affiant did not know of the existence of such evidence until after the term of court because the persons present had, most of them, moved away and "none of them had ever informed affiant of the facts as to such conversation until recently," did not sufficiently show the diligence required of the moving party in such a case.
2. The refusal of a new trial upon newly discovered evidence which is cumulative or impeaching in character rests largely in the discretion of the trial court.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Alexander Athey, for the appellant.

For the respondents there was a brief by *Graves & Earll,* and oral argument by *R. B. Graves.*

KERWIN, J. This action was commenced in a justice's court and upon stipulation and bond filed it was removed to the circuit court, where it was tried by the court, a jury having been waived. The action was to recover balance due on contract for the sale of real estate. The court found as follows:

That on or about February 26, 1912, plaintiffs and defendant entered into a contract in writing wherein and whereby defendant was to pay said plaintiffs the sum of $1,600 as follows: $1,000 down, same to be paid by transfer of a certain mill property valued by the parties at $800 and by payment of $200 in cash, the cash in fact to be paid when plaintiffs should get the real estate described in the contract released from incumbrance; balance to be paid in

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annual instalments of $150 each; that in consideration of said payments to be made by defendant, plaintiffs were to convey to him certain real estate (describing it) in Crawford county; that plaintiffs subsequently conveyed said real estate to defendant, and defendant executed a note and mortgage to plaintiffs for payment of $600 as agreed to be paid in annual instalments; that said contract was never modified; that on or about the 1st of June, 1912, plaintiffs procured a release of the incumbrance on said real estate, presented same to defendant, and demanded payment of the $200 to be paid them, and defendant refused and neglected to pay the same and has ever since refused and neglected to pay the same; that no part of said sum of $200 has ever been paid.

The court concluded that there was justly due and owing the plaintiffs from defendant $200 with interest at six per cent. per annum from June 1, 1912, with costs and disbursements of action. Judgment was entered in favor of the plaintiffs, from which this appeal was taken.

Two grounds are urged for reversal: (1) That the findings are not supported by the evidence; and (2) that a new trial should have been granted on the ground of newly discovered evidence.

1. A careful examination of the record convinces us that the findings are well supported by the evidence.

2. We are also satisfied that there was no error in denying the motion for new trial. The ground of new trial set up in the moving papers is alleged newly discovered evidence impeaching or cumulative in character. It is alleged that the defendant did not know of such evidence until after the term of court had adjourned. The affidavits and moving papers upon which the motion for new trial is based fall far short of showing the diligence required in endeavoring to obtain the desired evidence for use upon the original trial. *Scott v. Hobe,* 108 Wis. 239, 84 N. W. 181; *Edmister v.*

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Garrison, 18 Wis. 594. A mere statement of diligence or want of negligence is not sufficient. *Kurtz v. Jelleff,* 104 Wis. 27, 80 N. W. 41; *Lewis v. Newton,* 93 Wis. 405, 67 N. W. 724. The allegation respecting diligence in the moving papers is as follows:

"The defendant did not know of the existence of said evidence until after the said term of court had adjourned, as the parties who were present in the milk station and barber shop of James Calloway had, most of them, moved from Bell Center, and none of them had ever informed affiant of the facts as to such conversation until recently."

This is not sufficient. *Johnson v. Goult,* 106 Wis. 247, 82 N. W. 139.

3. Nor does it appear that the alleged newly discovered evidence, if obtained, would probably produce a different result. The alleged newly discovered evidence is positively denied by one of the plaintiffs, *William Weichman.* The trial court has a broad discretion in the matter of granting or refusing new trials. Upon the facts in this case we are clear that such discretion was not abused. *Anderson v. Arpin H. L. Co.* 131 Wis. 34, 110 N. W. 788. The refusal of a new trial upon newly discovered evidence which is cumulative or impeaching in character rests largely in the discretion of the trial court. We find no error in the record.

By the Court.—The judgment is affirmed.

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CARDINE, Appellant, vs. SCHAFFENBUHL and another, Respondents.

May 1—May 21, 1914.

Trespass: Title to land: Adverse possession: Findings of fact: Appeal: Review.

In an action to restrain continuing trespasses, brought by one claiming title to land by adverse possession, questions of fact only being presented and the findings of the trial court being fairly supported by evidence, the judgment for defendants is affirmed.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Alexander Athey, for the appellant.

For the respondents there was a brief by *Graves & Earll,* and oral argument by *R. B. Graves.*

TIMLIN, J. In this case, brought to restrain continuing trespasses, the plaintiff owned block 19 in the recorded Union Plat of Prairie du Chien, and claimed that by adverse possession his south boundary extended across Cedar street, which lies south of said block, and included a part of block 18, which lies south of that part of Cedar street. This plat was recorded in 1856 and was made by certain persons claiming to own the lands to be platted. Some of the questions argued by appellant are not in the case because there is no evidence to show which of the original French claims or what part of such claim or claims covered that part of the ground platted into blocks 18 and 19, and because the plaintiff and defendant both claim under the plat mentioned. Cedar street between blocks 18 and 19 has not been opened for travel, but west of this it has. We find no question presented by the evidence except a claim on the part of the plaintiff that his south boundary was by adverse possession extended so as to take in Cedar street and a portion of the

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north part of block 18. Upon this part the trespasses are alleged to have been committed. As against this the defendant offered evidence tending to show that plaintiff's possession was not exclusive or continuous, was not for the requisite length of time, and lack of inclosure, and also that defendant had possession. There was contradictory and conflicting evidence in support of the respective claims of the parties, and the case presented for the decision of the court below questions of fact only. The findings are fairly supported by evidence, and the judgment must be affirmed.

By the Court.—Judgment affirmed.

CULVER, Appellant, vs. MARX, Respondent.

May 1—May 21, 1914.

Slander: Words actionable* per se: *Imputing crime: Pleading: Questions for jury.

1. Spoken words which, taken as a whole and in their natural, popular, and common acceptance, would be understood by persons of average intelligence as stating that plaintiff was guilty of a criminal offense, are actionable *per se*.
2. If there is reasonable ground for conflicting inferences as to how the alleged slanderous words would naturally be understood, the complaint should not be held bad, but the jury should be permitted to say what the correct inference is.
3. Language which would naturally be understood as stating that plaintiff assisted her husband in keeping a house of ill-fame by promiscuous sexual intercourse with men who visited the place, and that she also followed the practice of getting men into compromising positions so that the husband could extort blackmail from them, was slanderous *per se*.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Masters, Graves &*

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Masters, attorneys, and *C. W. Graves,* of counsel, and oral argument by *R. B. Graves.*

For the respondent there was a brief by *T. P. Abel,* attorney, and *Daniel H. Grady,* of counsel, and oral argument by *Mr. Grady.*

BARNES, J. This is an action for slander. The complaint alleged that the plaintiff was a married woman living with her husband, C. M. Culver, at Cashton, Wisconsin. The complaint then sets out the language used, which will be found in 155 Wis. 453, 144 N. W. 982. The former action was brought by plaintiff's husband.

A demurrer *ore tenus* was interposed to this complaint on the ground that it did not set forth a cause of action. An order was entered sustaining the demurrer, but granting leave to serve an amended complaint. The plaintiff refused to amend and judgment was entered dismissing the action. Plaintiff appeals from the judgment.

On the appeal in the other case it was in effect held that the language used was slanderous *per se* as to the husband of the plaintiff. The respondent on the present appeal insists that the court should say as a matter of law that the language is not slanderous as to the wife.

If persons of average intelligence, taking the words used in their natural, popular, and common acceptance, would understand therefrom that plaintiff was guilty of a criminal offense, assuming that the language used was true, the complaint states a cause of action. *Pandow v. Eichsted,* 90 Wis. 298, 63 N. W. 284; *Elmergreen v. Horn,* 115 Wis. 385, 388, 389, 91 N. W. 973; *Campbell v. Campbell,* 54 Wis. 90, 11 N. W. 456; *Pfister v. Milwaukee Free Press Co.* 139 Wis. 627, 651, 121 N. W. 938; *Robertson v. Edelstein,* 104 Wis. 440, 443, 80 N. W. 724; *Hamlin v. Fantl,* 118 Wis. 594, 95 N. W. 955. If there was reasonable ground for conflicting inferences on the point, the jury should have been per-

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mitted to say what the correct inference was. *Schild v. Legler,* 82 Wis. 73, 75, 51 N. W. 1099; *Earley v. Winn,* 129 Wis. 291, 307, 109 N. W. 633. It does not meet the situation to dissect each sentence used and show that no one sentence standing alone imputes an offense. The language must be taken in its entirety.

We think the language would naturally be understood as stating that plaintiff's husband kept a house of ill-fame and that plaintiff aided and assisted him in the calling by having promiscuous sexual intercourse with men who visited the place, and that she also followed the practice of getting men into compromising positions so that the husband could extort blackmail from them. Adultery, blackmail, and being an inmate of a house of prostitution are all criminal offenses. Aiding and abetting one who keeps such a house is likewise a crime. We hold that the language used was slanderous *per se* and that it was error to sustain the demurrer *ore tenus.*

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

CARTHEW, Respondent, vs. CITY OF PLATTEVILLE, Appellant.

May 1—May 21, 1914.

Nuisances: Abatement: Damages: Action, at law or in equity? Misjoinder of causes: Municipal corporations: When claims, etc., need not be presented.

1. An action under sec. 3180, Stats. 1911, to abate a continuing nuisance and to recover damages for the injuries already suffered is an equitable action. KERWIN and TIMLIN, JJ., dissent.
2. The fact that two kinds of relief are asked for in such action does not render the complaint demurrable on the ground that several causes of action have been improperly united.

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3. Sec. 925—58, Stats., providing that no action shall be maintained against a city "upon any claim or demand of any kind or character whatsoever" until the claim or demand shall first have been presented to the council and disallowed, does not apply to an action for equitable relief, even though full relief therein will include money damages.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Suit in equity to abate a nuisance and to recover damages. The substance of the complaint is to the effect that the defendant city has unlawfully, wilfully, and negligently permitted filthy sewage to flow from a septic tank belonging to its sewage system upon the lands of the plaintiff, thereby contaminating the water thereon which had theretofore been used by his cattle for drinking, and otherwise injuring his land, and that it will continue to do so in future unless restrained by the court.

The defendant demurred to the complaint on the ground that several causes had been improperly united, namely, a cause of action for damages maintainable only upon an appeal from the disallowance of a claim therefor filed pursuant to secs. 925—58 to 925—60, Stats. 1911, and a cause of action in equity to abate a nuisance. It also demurred to that part of the complaint stating a cause of action for damages on the ground that the court had jurisdiction of such a cause of action only upon an appeal from a disallowance or nonallowance by the common council of a claim therefor filed as provided in secs. 925—58 to 925—60, Stats. 1911. The court overruled the demurrer and the defendant appealed.

R. A. Goodell, for the appellant.

Calvert Spensley, for the respondent.

VINJE, J. The complaint states a good cause of action under sec. 3180, Stats. 1911, and is clearly not subject to demurrer on the ground that several causes of action have

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been improperly united in that it asks for damages as well as for the abatement of the nuisance. The statute expressly gives circuit courts jurisdiction of actions "to recover damages for and to abate private nuisances or a public nuisance from which any person suffers a private or special injury peculiar to himself." The statute does not contemplate that separate suits should be brought for damages and for the abatement of the nuisance, nor has such been the practice. *Karns v. Allen,* 135 Wis. 48, 115 N. W. 357. It is quite obvious that there is here only one cause of action stated in the complaint, only one subject matter of litigation, namely, the damage resulting to plaintiff from the alleged wrongful flow of sewage from the septic tank. Relief as to future damages is sought through an abatement of the nuisance, as to past damages by way of money compensation. Diversity of relief does not imply diversity of causes of action. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Herman v. Felthousen,* 114 Wis. 423, 90 N. W. 432; *Simon v. Weaver,* 143 Wis. 330, 127 N. W. 950. The cause of action stated is an equitable one. Sec. 3180, Stats. 1911; *St. Croix C. C. Co. v. Musser-Sauntry L., L. & M. Co.* 145 Wis. 267, 130 N. W. 102. The complaint alleges the injury is continuous. Previous to the enactment of ch. 190, Laws of 1882, sec. 3180 [R. S. 1878] ended with the words "and to grant injunctions to prevent the same," in the fourth line, and it was held in a number of cases beginning with *Remington v. Foster,* 42 Wis. 608, and ending with *Stadler v. Grieben,* 61 Wis. 500, 21 N. W. 629, that an action under it was an action at law, and that the statute abrogated the equitable remedy of a private party to have a nuisance abated. To restore the equitable remedy, ch. 190 of the Laws of 1882, which is the rest of the section as it now stands, was passed. This chapter expressly restored the equitable remedy of abating a nuisance in all cases coming within the calls thereof. *Denner v. C., M. & St. P. R. Co.* 57 Wis. 218, 221,

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15 N. W. 158; *Stadler v. Grieben,* 61 Wis. 500, 21 N. W. 629. And equitable actions have since been maintained under it. *Fraedrich v. Flieth,* 64 Wis. 184, 25 N. W. 28; *Rogers v. John Week L. Co.* 117 Wis. 5, 10, 93 N. W. 821; *Karns v. Allen,* 135 Wis. 48, 115 N. W. 357; *St. Croix C. C. Co. v. Musser-Sauntry L., L. & M. Co.* 145 Wis. 267, 130 N. W. 102. As an incident to a part of the proper relief money damages are asked, but that fact does not change the nature of that cause of action. It still remains a suit in equity.

So far as material upon this appeal, the only provision in the statutes referred to in the statement of facts is the following from sec. 925—58:

"No action shall be maintained by any person against any city organized under the provisions of this chapter upon any claim or demand of any kind or character whatsoever, until he shall have first presented his claim or demand to the council for allowance and the same shall have been disallowed in whole or in part."

It has been held that such statutory provisions do not apply to an action for equitable relief. *Pinkum v. Eau Claire,* 81 Wis. 301, 51 N. W. 550; *Davis v. Appleton,* 109 Wis. 580, 85 N. W. 515. This is such an action. The fact that in order to grant the full relief to which plaintiff may be entitled money damages are awarded does not bring it within the statute. Such relief flows out of the main cause of action as an appropriate incident thereto. A suit in equity may require many forms of relief, including an award of money damages. The nature of the suit is not destroyed or affected by the forms of relief granted.

By the Court.—Order affirmed.

KERWIN, J. (*dissenting in part*). I dissent from so much of the majority opinion as holds that the action is in equity. The statute plainly provides for an action at law to recover

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damages and to abate a private or public nuisance, and when equitable relief is necessary, for an equitable action.

"Sec. 3180. The circuit courts shall have jurisdiction of actions to recover damages for and to abate private nuisances or a public nuisance from which any person suffers a private or special injury peculiar to himself, so far as necessary to protect the rights of such person, and to grant injunctions to prevent the same; and in case such nuisance may work an irreparable injury, interminable litigation, a multiplicity of actions, or either, or the injury is continuous and constantly recurring, or there is not an adequate remedy at law, or the injury is not susceptible of adequate compensation in damages at law, then an action in equity may be maintained and an injunction be issued therein, and an equitable action may be brought before the nuisance or the infringement of plaintiff's right is established at law."

In the instant case it is plain from the allegations of the complaint that the remedy at law under the statute to recover damages and for the abatement of the nuisance is adequate and complete. The complaint is barren of allegation necessary to make an equitable cause of action. The relief asked and which can be afforded at law is as full, complete, and adequate to the ends of justice as could be afforded in equity. The mere fact that the statute gives injunctive relief pending the action does not turn an action at law for damages and to abate a nuisance into an equitable action. Either party is entitled to a jury trial on the question of damages when the case is brought under the first part of the quoted statute.

Mr. Justice TIMLIN, I am authorized to say, concurs in this dissent.

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JOHNS and another, Respondents, vs. CITY OF PLATTEVILLE, Appellant.

May 1—May 21, 1914.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

R. A. Goodell, for the appellant.

Calvert Spensley, for the respondents.

VINJE, J. This case presents the same questions as the preceding case of *Carthew v. Platteville, ante*, p. 322, 147 N. W. 375, and is ruled by it.

By the Court.—Order affirmed.

WILL OF MITCHELL.

May 1—May 21, 1914.

Wills: Construction: Adopted child not a "child:" Appeal: Review.

1. The rule that the purpose of the testator is to be strictly carried out if it can be fairly gathered from the language used, in the light of the entire instrument and the characterizing circumstances, applies in determining whether a provision in a will for the "child" of another refers to an adopted child as well as a child of the blood.
2. In this case an adopted child of the testator's son is *held* not to be a "child" of such son within the meaning of the will.
3. The precise meaning intended by a testator in using a particular expression is a matter of fact to be solved from evidentiary inferences, and the result reached by the trial court, if consistent with correct principles of law, will not be disturbed on appeal unless clearly wrong.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Proceeding for the construction of the will of William J. Mitchell, deceased.

The will was made December 7, 1894. The testator had eight children. The oldest was about fifty-five and the young-

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est forty years of age. He had forty grandchildren. One of his sons,—William Henry Mitchell,—in his forty-seventh year and on May 10, 1892, married a woman aged forty-four years. Neither had been married before. She was forty-seven when the will was made. The testator was an illiterate man. He possessed considerable property. He remembered each of his children by a substantial provision therefor with directions, in some cases, for remainders and survivorships, indicating an intention to have his property go to and be enjoyed by persons of his own blood. The sixth clause contained this provision for his son William Henry:

"I give, devise and bequeath unto my son William Henry Mitchell the north half of the southwest quarter of the southwest quarter (N. ½ of S.W. ¼ of S.W. ¼) and the southeast quarter of the southwest quarter of the southwest quarter (S.E. ¼ of S.W. ¼ of S.W. ¼) of section number twenty (20) and the east half of the southwest quarter (E. ½ of S.W. ¼) of section number twenty (20), all in township number five (5), range number three (3) east, in Iowa county, state of Wisconsin, for and during the term of his natural life, and from and after his death, I give, devise and bequeath the same unto his children should he have any at the time of his death. If at the death of my said son William Henry Mitchell he does not leave him surviving any child or children or any child or children of a deceased child, and his wife survives him, then and in that event I direct that the real estate herein in this sixth item of my will mentioned shall be sold by my executors hereinafter named, and if my said executors be not then living by such person as the county court of Iowa county, Wisconsin, shall appoint, hereby giving unto my said executors full power to convey and deed the same, and the proceeds derived from the sale of said real estate shall be invested in good interest-bearing securities and hold the same for the following purposes: They, my said executors, shall pay two thirds of the interest to the wife of my son William Henry Mitchell as long as she shall live or remain his widow; the other third to be paid to my wife during her life, and after her death to be kept by my said executors and

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distributed with the principal as hereinafter stated. After the death or remarriage of the wife of my said son William Henry Mitchell I direct that said principal sum and what accrued interest may be in their hands to be equally divided among my children then living, no grandchild taking any part thereof. But should the wife of my son William Henry Mitchell die before him, then at his death, if he dies leaving no children surviving him, I give, devise and bequeath all of my said real estate mentioned in the sixth item of my will to my children then living in equal share, and if none of my children are living, then I direct said land to be sold by my executors as herein stated and to divide the proceeds among all my grandchildren in equal shares."

After the will was made *Clarence Somerville* was born. He was not of the blood of, nor was his existence known to, the testator who died about sixty days after the birth of the child. About five years after testator's death *Clarence* became the adopted child of William Henry Mitchell and wife. About seven years thereafter William died, leaving surviving his wife and adopted son.

These proceedings were commenced in county court. The question at issue was whether the adopted son answered to the call for a surviving child under the sixth clause of William J. Mitchell's will. The decision was in the negative. An appeal was taken to the circuit court on behalf of *Clarence,* resulting in the judgment of the county court being affirmed. This appeal is therefrom.

Ernest C. Fiedler, special guardian of *Clarence Mitchell,* appellant, cited sec. 4024, Stats.; *Johnson's Appeal,* 88 Pa. St. 346; *Parsons v. Parsons,* 101 Wis. 76, 77, 77 N. W. 147; *Glascott v. Bragg,* 111 Wis. 605, 609, 87 N. W. 853; *Lichter v. Thiers,* 139 Wis. 481, 121 N. W. 153; *Sandon v. Sandon,* 123 Wis. 603, 101 N. W. 1089; *In re Leask,* 197 N. Y. 193, 90 N. E. 652, 27 L. R. A. N. S. 1158; *Hartwell v. Tefft,* 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500; *Warren v. Prescott,* 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435; *Sewall v. Roberts,*

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115 Mass. 262; *Wyeth v. Stone,* 144 Mass. 441, 11 N. E. 729; *Bray v. Miles,* 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510; *In re Olney,* 27 R. I. 495, 63 Atl. 956.

T. M. Priestley, for the administrator *de bonis non,* with the will annexed, argued, among other things, that there is a distinction between an adopted child taking under the will of its parent and that child's taking under the will of some one else, and the weight of authority is to the effect that where the statute of adoption makes an adopted child the child of the adoptor for purposes of inheritance, its object is to enable the child to inherit *from* and not *through* the adoptive parent, and that an adopted child will not benefit by a limitation over in a deed or grant to the adoptor's child or children. *Stout v. Cook,* 77 N. J. Eq. 153, 75 Atl. 583; *Freeman's Estate,* 40 Pa. Super. Ct. 31; *In re Hopkins,* 102 App. Div. 458, 92 N. Y. Supp. 463; *In re Leask,* 197 N. Y. 193, 90 N. E. 652; *Russell v. Russell,* 84 Ala. 48, 3 South. 900; *In re Woodcock,* 103 Me. 214, 68 Atl. 821; *Lichter v. Thiers,* 139 Wis. 481, 121 N. W. 153; *Jenkins v. Jenkins,* 64 N. H. 407, 14 Atl. 557; *Keegan v. Geraghty,* 101 Ill. 26; *Hockaday v. Lynn,* 200 Mo. 456, 98 S. W. 585, 8 L. R. A. N. S. 117; 27 Am. & Eng. Ency. of Law (2d ed.) 334; *Reinders v. Koppelman,* 94 Mo. 338, 7 S. W. 288.

Calvert Spensley, for the respondent *Richard Mitchell.*

MARSHALL, J. The purpose of a testator is to be strictly carried out if it can be fairly gathered from the language used to express it in the light of the entire instrument and the characterizing circumstances.

The rule stated applies in determining whether the word "child" of another in a will refers to a child of the blood of such other or an adopted child. *Lichter v. Thiers,* 139 Wis. 481, 121 N. W. 153.

The trial court in determining the precise meaning intended by a testator in using a particular expression deals with matter of fact to be solved from evidentiary inferences

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and, in case of a result being reached consistent with correct principles of law, the rule applies on appeal that such result will not be disturbed unless clearly wrong.

The trial court, in this case, reached the result complained of by weighing the evidentiary inferences arising from the whole will and its characterizing circumstances according to the foregoing principles. No clear indication of error in respect thereto appears. Therefore:

By the Court.—The judgment is affirmed.

ESTATE OF HEMPHILL: HEMPHILL, Administrator, Appellant.

May 1—May 21, 1914.

Actions: Abatement and survival: Accounting for rents, etc.: Wills: Construction: Devise of rents: Executors and administrators: Widow's allowance: Failure to claim: Trusts and trustees: Accounting: Interest: Compensation.

1. **A claim for an accounting in favor of one beneficially interested in a trust for the receipt of the rents and profits of real estate, is one which survives the death of the beneficiary.**
2. **Where a will devised to the testator's widow the rents of his farm during her natural life, she was entitled to such rents from the date of his death, although he had leased it before his death for a term which had not expired and taken notes for the entire rent.**
3. **In such case the rent should be apportioned by allowing the estate the amount which had accrued prior to the death of the testator.**
4. **A will devising to testator's widow the rent of his farm for life, subject to a certain annual charge, directing the conversion of the residue of his estate, and providing that the executor might, out of any moneys in his hands, pay to the widow any sum she might need "more than her share of the rent from the farm for her support and maintenance, . . . and at the death of my said wife both the residue of said money and credits is to be divided by my said executor among my four**

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sons . . . who are also to have all and any residue of my estate not otherwise disposed of herein," entitled the widow to the entire rent from the farm, subject to the charges named, although more than sufficient for her support; and any portion of such rent which had not been paid to her belonged, after her death, to her estate, not to that of the testator.

5. A trustee who was diligent in his management of the trust property, rendered annual accounts of his receipts and disbursements, kept the beneficiary informed as to the state of the accounts, and paid her money whenever she called for it and in such amounts as she required, though chargeable with such interest as he received on balances, should not be charged with compound interest.

6. Where the widow of a decedent neither selected her statutory allowance of $200 nor made claim to it during her lifetime, her administrator was not entitled to recover it after her death.

7. An administrator who, after filing his final account, continued in charge of a farm which was devised to the widow for life, collecting and disbursing the rents until her death, during which time he performed no other acts as administrator, should be allowed compensation out of the fund so handled, in a proceeding by her administrator for an accounting, whether he was to be considered as acting as a trustee or merely as her agent

APPEAL from a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

John Hemphill died testate June 17, 1903. He named in his will, which was admitted to probate, one Samuel I. Stein, of La Fayette county, Wisconsin, executor. Stein resigned the trust, and *Grant Hemphill,* son of John Hemphill, deceased, was appointed and qualified as administrator with the will annexed. The will of John Hemphill, deceased, bequeathed to his wife, Katharine Hemphill, during her life the rent from his farm in the town of Belmont, La Fayette county, Wisconsin, charged with the payment of $225 annually to Elizabeth Hemphill, divorced wife of John Hemphill, deceased, also taxes levied against said farm and other expenses necessary for the maintaining thereof in rentable condition; also devised and bequeathed to his wife a house and lots in the village of Belmont for the use and occupancy

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of said Katharine free of rental, except taxes and needed repairs during her lifetime. The will further provided that after the death of Katharine said farm should be sold by the administrator and the proceeds divided in the manner specified therein, also specified the disposition of the house and lots in the village of Belmont after the death of said Katharine.

Before the death of John Hemphill he rented the farm in question for one year from March 1, 1903, to March 1, 1904, which rent was paid in advance and represented by two notes of $450 each. which had not been paid at the time of his death. *Grant Hemphill*. administrator filed his account as administrator in 1905, and it is claimed that an order or judgment was drawn up purporting to settle the final account of said administrator. but was never signed by the county judge. Whether this judgment was ordered, or whether there is any proof sufficient to warrant the court in considering it, is in dispute. *Grant Hemphill* continued to act as administrator or trustee from the time of his appointment up to the time of the death of the widow, Katharine Hemphill which occurred on the 30th day of November, 1911. One Walter Wright was on the 21st day of May, 1912, appointed administrator of the estate of Katharine Hemphill, deceased. Said Walter Wright, administrator of the estate of Katharine Hemphill, after his appointment and qualification filed a petition in the county court asking that *Grant Hemphill,* as administrator with the will annexed and acting as trustee of the estate of Katharine Hemphill, account to the petitioner as administrator of the estate of Katharine Hemphill, deceased, for all moneys, property, effects, and credits in his hands belonging to the estate of said Katharine Hemphill. deceased, and charging that there still remained a large amount of money in the hands of said *Grant Hemphill* as administrator and trustee, the amount of which was not known, but was believed to be not less than $3,000. The court ordered

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an accounting in accordance with the prayer of the petition, and that the account be considered, audited, and passed upon by the court. Said *Grant Hemphill* afterwards filed in said county court his statement of account in response to the order made by the court, setting forth the amounts of money received for rents and also amounts paid out under the terms of the will. The account filed, on its face, showed a total rent received, so far as it concerned Katharine Hemphill or her estate, of $7,412.50, and the amount disbursed $7,419.56.

On appeal from the county to the circuit court the court below found that the estate of Katharine Hemphill was entitled to an accounting for the rents received by *Grant Hemphill,* including rent from March 1, 1903, to March 1, 1904, $950, and also charged *Grant Hemphill* with compound interest at the rate of five per cent. on annual balances of rent in his hands in excess of disbursements; also charged him with $200, "widow's allowance;" also found the account due as follows:

Balance due Katharine Hemphill's estate March 1, 1912..	$1,560 43
Interest on this amount to March 1, 1913.....	78 00
Interest from March 1, 1913, to September 3 1913.....	39 40
	$1,677 83
Add to this the widow's allowance from the estate of John Hemphill which the court finds was not paid to her during her lifetime.....	200 00
Total amount due estate of Katharine Hemphill September 3, 1913.....	$1,877 73

Judgment was rendered for the above amount with costs in the county and circuit courts against *Grant Hemphill,* administrator of the estate of John Hemphill, deceased, and in favor of the administrator of the estate of Katharine Hemphill, deceased. Before entry of findings *Grant Hemphill* presented a motion for rehearing, in which, among other things, he called the attention of the court to the fact that the decision of the court as made charged him with $950 rent for

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the year 1903–4, while in fact the record showed that the whole rent for that year was but $900, and further that it was announced at the trial that the two notes which came into the hands of *Grant Hemphill* for the first year's rent, amounting to $900, were the personal property of the estate of John Hemphill, deceased, and did not constitute rent which Katharine Hemphill, widow, was entitled to upon accounting; and that after such announcement by the court no argument was presented by the appellant, and the appellant desired opportunity to present argument and authorities upon that phase of the matter. No hearing was granted on this motion, and findings were filed and judgment rendered in accordance with the decision of the court. The appellant duly excepted to the findings of the court complained of, and appealed to this court from the judgment.

For the appellant there was a brief by *Gilbert & Ela* and *E. F. Conley,* and oral argument by *Emerson Ela.*

For the respondent there was a brief by *Orton & Osborn,* and oral argument by *C. E. Osborn.*

KERWIN, J. Counsel for appellant raises a preliminary question to the effect that the petition herein should have been dismissed, and further, on the merits, claims that the accounting of the court below is erroneous in several particulars which will be briefly considered.

1. On the point that the petition of the administrator of Katharine Hemphill, deceased, should have been dismissed. counsel for appellant cites secs. 2089 and 4253, Stats., and, as we understand the argument, it is insisted that the claim for an accounting did not survive. We think the contention of counsel under this head cannot be sustained, and that the court below was right in denying the motion to dismiss.

2. It is insisted that the court erred in crediting the estate of Katharine Hemphill with rents from the farm for the year 1903–4, on the ground that, a lease for that year having been made by John Hemphill before his death and notes

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taken for the rent, such notes became assets of his estate and did not pass to the widow under the devise and bequest of rents and profits from the farm. And it is further insisted that under the will the widow did not get a life estate in all the rents from the farm, but only such portion thereof as was necessary for her support and maintenance. We cannot agree with counsel in this contention. The will upon its face is quite specific, and it appears therefrom that the deceased intended that his widow should have all the rents from the farm during her life subject to the charges therein made. The will provides:

"After the payment of my just debts and funeral expenses I give, devise and bequeath to my wife, Katharine Hemphill, the rent from my farm located in the town of Belmont, La Fayette county, Wisconsin, except two hundred and twenty-five and no/100 dollars ($225), which shall be anually paid out of said rent, one hundred dollars ($100) on the first of July and one hundred twenty-five and no/100 dollars ($125) on the first day of January of each year to Mrs. Elizabeth Hemphill, of Van Wert, Van Wert county, Ohio, or to her legal agent, Mr. Peter Smith, of Van Wert, Van Wert county, Ohio, or his legal successor as such agent, during the lifetime of said Mrs. Elizabeth Hemphill. The said Katharine L. Hemphill is to pay all taxes levied against said farm and other expenses necessary to be incurred for the maintaining of said farm in a good rentable condition, as long as my wife, Katharine L. Hemphill, lives."

The will further provides that after the death of Katharine Hemphill the farm should be sold by the executor and the proceeds divided in the manner therein specified. It further empowers the executor to convert any property which the testator might own at the time of his death into money and reinvest the proceeds, and further provides that the executor may, out of any money in his hands, pay to his wife, Katharine Hemphill, any sum that she may need "more than her share of the rent from the farm for her support and maintenance as to my said executor may seem necessary, and at

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the death of my said wife both the residue of said money and credits is to be divided by said executor among my four sons above named, to wit: James Hemphill, *Grant Hemphill,* John J. Hemphill, and Edward Hemphill, or their legal heirs, who are also to have all and any residue of my estate not otherwise disposed of herein." Under these provisions it is insisted by counsel for appellant that only such portion of the rents as might be necessary for the support and maintenance of the widow should be paid to her by the executor, and that, since all of said rent had not been paid to her during her lifetime, the balance belonged to the estate of John Hemphill. We do not think this the proper construction of the will. It seems quite clear from its terms that the testator intended to devise and bequeath to his widow all rents from said farm subject to the charges therein named, and that if any further sum were necessary for her support and maintenance, such sum should be provided for her by the executor out of the residue of the estate. Nor can we agree to the construction contended for by counsel respecting the first year's rent. The mere fact that the testator in his lifetime leased the property for one year, namely, from March 1, 1903, to March 1, 1904, and took two notes of $450 each in payment of the rent, and died during the year, did not deprive his widow of the whole year's rent. We think the first year's rent should be apportioned between the estate of John Hemphill and the estate of Katharine Hemphill. John Hemphill having died June 17, 1903, the $900 rent should be apportioned by allowing his estate $267.50, being rent at the rate of $900 a year from March 1, 1903, to the time of his death, and the balance, $632.50, to the estate of Katharine Hemphill. It is conceded that an error of $50 was made in crediting $950 for the first year's rent instead of $900, so that under this head there should be deducted from the credits allowed Katharine Hemphill's estate the sum of $267.50 plus $50, or $317.50.

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3. The court below, in settling the account of *Grant Hemphill,* charged him with interest on balances of money in his hands covering the time he was acting as administrator or trustee. This is assigned as error on the ground that it amounted to charging him with simple and compound interest on moneys in his hands collected from rents belonging to the widow. The court below seems to have charged this interest on the theory that the administrator had in his hands, belonging to the estate of Katharine Hemphill, moneys which he used or received benefits from. Counsel for respondent cites us to pages of the record where they claim it appears that this money in the hands of *Grant Hemphill* had been invested at interest by him during the entire period and that he received interest at the rate of five per cent. per annum thereon. We fail to find evidence establishing this fact. True, on the pages referred to it appears that interest was collected on certain notes, but this interest was charged to *Grant Hemphill.*

It appears from the record that *Grant Hemphill* rendered annual accounts showing all items of receipts and disbursements and that he paid Katharine money whenever she called upon him for it, and in such amounts as she required, and that she was familiar with the accounts as rendered and was never refused money when she requested it and never demanded any balance. It also appears that *Grant Hemphill* was diligent in the performance of his trust in managing the property of the widow and kept the farm well rented and produced a good income therefrom and diligently performed his duties in that regard. It is urged by counsel for appellant that under all the circumstances interest was improperly charged. The court below credited the estate of Katharine with interest at the rate of five per cent. upon various balances aggregating $328.50, a small portion of which sum is compound interest. It is at least doubtful whether the estate of Katharine should have been credited with any inter-

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est upon the facts disclosed by the evidence. 22 Cyc. 1485, 1504, 1542, 1544; *O'Herrin v. Milwaukee Co.* 67 Wis. 142, 30 N. W. 239. But in view of the fact that the court below held that *Grant Hemphill* received five per cent. on the balances remaining in his hands, and this fact is not disputed by counsel for appellant so far as appears from the record, we are unable to say that this finding should be disturbed so far as simple interest is concerned. But it is clear that compound interest should not have been allowed. *Martin v. Morris,* 62 Wis. 418, 22 N. W. 525; *Lynch v. Ryan,* 137 Wis. 13, 118 N. W. 174.

4. The court below also credited the estate of Katharine Hemphill with $200, "widow's allowance," under sec. 3935, Stats., which provides that the widow shall be allowed the household furniture of the deceased, not exceeding in value $250, and "other personal property to be selected by her, not exceeding in value $200." It does not appear from the record that this $200 allowance was ever selected or claimed by her during her lifetime, therefore it is contended it was error to allow it in the accounting. The contention of appellant seems to be supported by *Resch v. Senn,* 28 Wis. 286; *Wilcox v. Matteson,* 53 Wis. 23, 9 N. W. 814; 18 Cyc. 395; *Tarbox v. Fisher,* 50 Me. 236; *Adams v. Adams,* 10 Met. 170; *Cox v. Brown,* 5 Ired. L. 194; *Kimball's Adm'r v. Deming,* 5 Ired. L. 418; *Williams's Appeal,* 92 Pa. St. 69.

It is urged by counsel for respondent that it must be presumed that this allowance was included in some of the payments made to the widow by *Grant Hemphill.* There is nothing in the record, however, to raise any such inference. Obviously the court below included this amount in the credits on the theory that her estate was entitled to it as matter of right under the statute, notwithstanding she neither selected nor made claim to it during her lifetime. In this conclusion we think the learned trial court was in error.

5. It is further insisted by appellant that the court erred

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in not allowing compensation to *Grant Hemphill* as administrator or trustee of the John Hemphill estate in handling the rents from the farm. The learned trial court, as we understand the record, denied compensation on the ground that it should be paid out of the John Hemphill estate, and that *Grant Hemphill* was acting in his capacity as administrator up to the time that Katharine Hemphill died, not as trustee. It seems that in December, 1905, *Grant Hemphill* filed his final account as administrator and that a judgment was drawn up settling such account, but was never signed, and it is claimed on the part of the appellant that the judgment was declared by the county court, but through inadvertence remained unsigned, while on the part of the respondent it is claimed that there is no proof upon this point. It also appears in the printed case that a bond of *Grant Hemphill* as trustee, dated January 27, 1906, was executed and filed, but respondent contends that these papers were not properly a part of the bill of exceptions. The trial judge states in the bill of exceptions that he is unable to say whether the unsigned judgment or bond of *Grant Hemphill* as trustee was put in evidence. However we do not regard the point very important, for the reason that so far as appears from the record there was nothing done by *Grant Hemphill,* after the time of the alleged filing of his final account as administrator, except what was done by him in managing the estate of Katharine Hemphill by way of renting the farm, keeping it in good rentable condition, collecting rents, etc., so that in that regard it would seem equitable and just, whether he was acting in the capacity of trustee or agent for Katharine Hemphill, that compensation should be paid him out of the funds which he was handling for her, and especially so in view of the fact that he was charged with interest upon all sums in his hands. We therefore conclude that the court erred in not allowing him compensation, and that he should be allowed all necessary expenses in the care, management,

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and settlement of the life estate of Katharine Hemphill in the farm and for his services $1.50 per day and commissions upon the amount of the personal estate collected and accounted for by him as provided by sec. 3929, Stats. Counsel for respondent urge exceptions filed by them to certain findings of the court below respecting items credited to the administrator which they claim should not have been so credited. We think the contention of counsel under this head is without merit.

It therefore follows that there should be deducted from the judgment of the court below against *Grant Hemphill* $50, admitted to be excess of rent for the first year; $267.50, the portion of the first year's rent which the estate of John Hemphill was entitled to; $200 "widow's allowance;" and the amount of compound interest charged; also compensation of *Grant Hemphill* to be ascertained and determined according to the provisions of sec. 3929, Stats.; and that such further proof be taken in the court below as may be necessary to determine the amount of such compensation as above indicated.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ZELLMER, Appellant, vs. MARTIN, Respondent.

May 2—May 21, 1914.

Adverse possession: Statutes construed: Evidence: Sufficiency: Burden of proof: Instructions to jury.

1. Under sec. 4207, Stats., a continuous disseisin of the true owner for twenty years bars his right of action to recover real property or the possession thereof; and neither sec. 4212 nor sec. 4214 purports to enumerate all the conditions which constitute adverse possession.
2. Evidence tending to show that defendant, owning and occupying

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an adjoining farm, was for more than twenty years next prior to the commencement of the action using with and as a part of his wood-lot and pasture, for the purpose of obtaining firewood, building timber, ties, and stone, and for pasturing his cattle thereon, a strip of plaintiff's land which, with said wood-lot and pasture, was inclosed on three sides, though open on the fourth side to the highway, and was separated from the remainder of plaintiff's farm by a substantial boundary fence, together with evidence of continuous claim of ownership of the strip by defendant in hostility to plaintiff's claim of ownership, was sufficient to sustain a finding of title in defendant acquired by twenty years' adverse possession.

3. Adverse possession must be exclusive of the true owner, but not necessarily exclusive at all times of temporary entries upon the lands by third persons not under claim of title; and in this case defendant's continuity of possession was not interrupted by occasional trespasses by the cattle of other persons straying in from the highway, nor even by such occasional and unintentional trespasses by cattle of the plaintiff.

4. An instruction to the effect that the burden of proof is on the party asserting title by adverse possession to satisfy the minds of the jury "by a fair preponderance of the evidence to a reasonable certainty," was not prejudicially erroneous.

APPEAL from a judgment of the circuit court for Monroe county: JAMES WICKHAM, Judge. *Affirmed.*

For the appellant there were briefs by *Graham & Graham,* and oral argument by *J. G. Graham.* To the point that the trial court erred in the instruction as to the burden of proof, they cited *Button v. Metcalf,* 80 Wis. 193, 49 N. W. 809, 810; *Allen v. Murray,* 87 Wis. 41, 57 N. W. 979, 981; *Ill. S. Co. v. Budzisz,* 115 Wis. 68, 90 N. W. 1019; *Pritchard v. Lewis,* 125 Wis. 604, 615, 104 N. W. 989; *Lampman v. Van Alstyne,* 94 Wis. 417, 69 N. W. 171; *Dewey v. Spring Valley L. Co.* 98 Wis. 83, 73 N. W. 565; *Will of Ball,* 153 Wis. 27, 141 N. W. 8, 11; *Lepley v. Andersen,* 142 Wis. 668, 125 N. W. 433.

Thorwald P. Abel, for the respondent.

TIMLIN, J. Ejectment for a strip of land one fourth of a mile long and about four rods wide, successfully defended

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on the ground of adverse possession. Errors assigned: (1) refusal to direct a verdict for plaintiff; (2) instructions with reference to burden of proof. The plaintiff owned the southeast quarter of the northwest quarter of section 1, which, except the strip in question, was woodland inclosed by him. The defendant owned the northeast quarter of the southwest quarter of section 1, the north half of which was woodland which was inclosed on the north, west, and south sides and included the strip in question. The evidence was ample to establish that the possession of defendant and his grantor, such as it was, was hostile to the claim of title of the plaintiff, but the point is made that because of lack of inclosure on the east side and by reason of insufficiency of evidence that the land was "usually cultivated and improved," there was lack of evidence to establish adverse possession under sec. 4214, Stats. 1913. There was evidence that the land in question, together with the defendant's adjoining woodland, was serviceable for pasture only and as a wood-lot. The defendant occupied the adjoining land and used this wood-lot, inclosed on three sides as aforesaid, for pasture and for getting his firewood, cutting fence posts, and taking stone and timber therefrom, for more than twenty years next prior to the commencement of this action. During this time he of course did not always take the firewood, timber, or stone from the particular strip in controversy, but from the wood-lot inclosed therewith as stated, and from this strip occasionally, using all this wood-lot inclosed on three sides in the usual and ordinary way in this respect. This use was as continuous as such use ordinarily is, that is to say, it was used for pasture during the appropriate season of the year and for cutting firewood, building, and other timber, and stone, during the season proper for that kind of work. This applies to the whole tract inclosed by defendant. If we limit the taking of firewood, timber, and stone to the strip in controversy, the acts of this latter nature were not continuous. The ques-

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tion is whether such possession and occupancy may uphold a finding of title by adverse possession under sec. 4214, Stats., where there is no claim under a written instrument.

(1) The statute does not purport to enumerate all the conditions which may constitute adverse possession. It is affirmative only. *Wilson v. Henry,* 40 Wis. 594. This is true of sec. 4214 as well as of sec. 4212. A continuous disseisin of the true owner for twenty years bars his right of action to recover real property or the possession thereof. Sec. 4207, Stats.

(2) Evidence tending to clearly show that the defendant, owning and occupying an adjoining farm, was for more than twenty years next prior to the commencement of the action using with and as a part of his wood-lot and pasture, for the purpose of obtaining from said lot firewood, building timber, ties, and stone, and for the purpose of pasturing his cattle thereon, a strip of plaintiff's land which with said wood-lot and pasture was inclosed on three sides but open upon the fourth side to the highway, and which with said wood-lot and pasture was separated from the remainder of plaintiff's farm by a substantial boundary fence during such period, together with evidence of continuous claim of ownership of this strip by the defendant in hostility to plaintiff's claim of ownership of the same strip, is sufficient to uphold a finding of title in defendant acquired by twenty years' adverse possession. *Ovig v. Morrison,* 142 Wis. 243, 248, 125 N. W. 449, and cases cited.

(3) Defendant's adverse possession must be exclusive of the true owner, not necessarily exclusive at all times of temporary entries upon the lands by third persons not under claim of title. Defendant's continuity of possession was not interrupted by occasional trespasses caused by the straying in upon the wood-lot from the highway of the cattle of other persons claiming no title to the land, nor even by such occasional and unintentional trespasses by cattle of the plaintiff

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straying in from the highway. *Ill. S. Co. v. Tamms,* 154 Wis. 340, 141 N. W. 1011.

(4) The third question of the special verdict was as follows: "Was the defendant or the defendant and his predecessor in title, before the commencement of this action, in the actual, exclusive, adverse possession of the land in controversy herein for a period of twenty years or more at any one time?" The court instructed the jury with reference to this question: "The burden of proof is upon the defendant to satisfy your minds by a fair preponderance of the evidence to a reasonable certainty that this question should be answered in the affirmative." We find no reversible error in this instruction.

By the Court.—Judgment affirmed.

BRITTINGHAM & HIXON LUMBER COMPANY, Appellant, vs. CITY OF SPARTA and another, Respondents.

May 2—May 21, 1914.

Constitutional law: Police power: Regulation of weights and measures: Classification: Coal dealers: Equal protection of the laws: Municipal corporations: Ordinances: Weighing of coal: Construction: Reasonableness: Partial invalidity: Penalties.

1. Weights and measures may be reasonably regulated under the police power.
2. Sec. 1666*b*, Stats. (ch. 566, Laws of 1911), which requires coal to be sold by weight and that the seller give to the purchaser with each delivery a ticket showing the gross weight of the load, the tare, and the net weight of the coal, or, when the buyer carries away his purchase, a ticket showing the actual number of pounds delivered, and to deliver duplicate tickets to the sealer of weights and measures on demand, does not purport to be a complete scheme for the regulation of weights, and under sec. 925—52, sub. (45), Stats., a city operating under the general charter law may still adopt reasonable regulations

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for the weighing and sale of coal not in conflict with any statute of the state.

3. An ordinance requiring that all coal offered for sale and delivered within the city limits, except in carload lots, shall be first weighed upon the city scales by the city weighmaster, who shall give the owner a signed ticket showing the quantity of coal in the load upon the return of the wagon unloaded and weighed, does not require the coal to be sold on the weight as shown by the city scales and so does not conflict with the statute which contemplates that coal may be weighed on any tested scales and sold on such weight.

4. An ordinance should not be declared void in its entirety because some of its provisions are deemed unreasonable, unless the court can say that the valid and void parts cannot be separated and that the former would not have been enacted except in conjunction with the others.

5. It is essential, however, to the sustaining of an ordinance in part that the portion upheld form, independently of the invalid portion, a complete law in some reasonable aspect, so that it may be fairly concluded that the council would have enacted it without the invalid parts.

6. An ordinance which has a reasonable tendency to provide a check upon the weighing of coal by the dealers is not void because incomplete and inadequate to fully accomplish that purpose, as by failing to provide means by which a purchaser can readily identify the load delivered to him from the records of the city weighmaster.

7. The fact that the expense of complying with the terms of an ordinance regulating the weighing and sale of coal will be large cannot affect its validity, since, if no more than a reasonable profit is being realized by the dealer, the expense must fall on the consumer.

8. If such an ordinance be unreasonable and therefore void as to sales made for consumption outside the city, where delivery is made at the dealer's yard in the city, it may still be held good as to other sales where the dealer hauls the coal from its yard and delivers it on the premises of the consumer within the city.

9. The fact that a city requires all coal to be weighed on its scales presupposes that it will furnish the scales and keep them in order and keep a man in charge of them at all times, excluding Sundays and legal holidays, when coal is customarily delivered, and if it fails to provide the means of weighing it cannot punish dealers for its delinquency.

10. So, if in exceptional cases deliveries must be made outside of the usual working hours in order to provide fuel for those in

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immediate need of it, the city must provide the means of weighing if it would exact penalties for failure to weigh.

11. A city has the right to place coal dealers in a class by themselves and legislate for the class, and so long as the legislation is reasonable there is no denial of the equal protection of the laws.

12. The exaction of a fee of ten cents a load for weighing is not so large as to indicate a purpose to tax the industry, or any purpose except to provide a fund sufficient to defray the expense of executing the law, and does not invalidate the ordinance.

APPEAL from an order of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For more than fifteen years the plaintiff corporation has been engaged in the business of selling coal to customers in the city of *Sparta,* and for that purpose maintains sheds and yards for the storage of coal. On or about October 7, 1913, the city of *Sparta,* acting through its mayor and common council, enacted "An ordinance to regulate the weighing of coal sold and delivered in the city of *Sparta.*" Sec. 1, the material paragraph of said ordinance, reads as follows:

"All coal offered for sale and delivered within the limits of the city of *Sparta,* except in carload lots, shall first be weighed at the public city scales of the city of *Sparta* by the weighmaster, and such weighmaster shall give to the owner thereof a written ticket with his signature attached thereto of the quantity of coal contained in such load upon the return of such wagon unloaded and weighed. It shall be the duty of the weighmaster to demand and collect the sum of ten cents for each load of coal weighed by him, to be paid by the person to whom the ticket or certificate shall be given, the same to be for the use of the said city of *Sparta* and to be accounted for and paid over at the same time and in the same manner as other fees received from the city scales."

After the passage and publication of the ordinance the manager of plaintiff's business in the city of *Sparta* was arrested upon a charge of violating the ordinance and upon trial in justice's court was found guilty. Pending an appeal to

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the circuit court plaintiff brought this suit to have the ordinance declared void and asking for an injunction restraining defendants from enforcing the ordinance against the plaintiff. The complaint in substance alleged that plaintiff had an established coal business in said city, with the ordinary and necessary equipment therefor; that the enforcement of said ordinance would render impossible or wholly impracticable the continuance of many of the ordinary phases of plaintiff's coal business and would otherwise oppress and restrain plaintiff in the conduct of its business; further, that the ordinance is *ultra vires* and void for the reason that it imposes a heavy burden upon the plaintiff and other dealers in coal in the city of *Sparta,* without accomplishing any public purpose or benefit; that it is unreasonable, oppressive, and in restraint of lawful trade; that it is rendered without purpose and useless by pre-existing state laws regulating weights and measures and the sale and delivery of fuel, is in conflict with the state system of regulation and the plain implication and spirit of the state laws; that it is discriminatory against plaintiff and other coal dealers and deprives them of the equal protection of the laws. Coincident with the service of the summons and complaint an order issued by the circuit court was served upon the defendants requiring them to show cause why a temporary injunction should not be granted restraining the defendants from enforcing the ordinance and enjoining the enforcement of the ordinance pending the hearing on the motion. After hearing on the motion the circuit court entered an order denying plaintiff's motion for an injunction and vacating the preliminary injunction theretofore granted, and from such order plaintiff appeals.

For the appellant there was a brief by *R. A. Richards* and *Olin, Butler & Curkeet,* and oral argument by *Ray M. Stroud.*

For the respondents there was a brief by *Graves & Masters,* and oral argument by *R. B. Graves.*

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BARNES, J. It is not claimed that weights and measures may not be reasonably regulated under the police power. The authorities holding that they may be are numerous and practically uniform. The city of *Sparta* is operating under the general charter law. Sec. 925—52, sub. (45), Stats., confers on common councils of cities organized under such law the power to regulate the weighing and sale of coal. The appellant contends that this power was taken away by ch. 566, Laws of 1911, particularly that part of the law which is now sec. 1666*b* of our Statutes; that the power of regulation, if it existed, was not reasonably exercised; and that the ordinance unjustly discriminates against members of a certain class.

Sec. 1666*b* requires coal to be sold by weight and obligates the seller to give to the purchaser with each delivery a ticket showing the gross weight of the load, the tare of the delivery vehicle, and the quantity of coal contained in the vehicle. A duplicate of this ticket must be delivered to the sealer of weights and measures on demand. When the buyer carries away his purchase, a ticket must be given him showing the actual number of pounds delivered.

Sec. 1661, sub. 1, provides for the appointment of sealers of weights and measures in cities having a population of more than 5,000, and sub. 2 of the same section makes it his duty to inspect all scales in use in his city.

Sec. 4432, sub. 1, prohibits the use of any weighing device which has not been sealed as therein provided.

Sec. 1666*b* contemplates that coal may be weighed on any tested scales and sold on such weight. The ordinance in question does not attempt to override the statute and does not conflict with it. It was passed after the statute was enacted and presumably with knowledge of it. We do not construe the ordinance as requiring coal to be sold on the weight as shown by the city scales. In a rather bungling way it attempts to provide for a check on the weighing done by the

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seller. In practice the purchaser seldom is or can be present when the coal which he has ordered is weighed. It does not help him out to know that the scales on which it was weighed were accurate if the work was done in a careless way or if the weight was dishonestly reported. By requiring that the weight be ascertained by a disinterested party, the purchaser has the means at hand of knowing whether the two weights substantially agree. There should be no material variance if both scales are in good order and the work of weighing is carefully done. If there is a variance the question of which is right is one of fact.

Sec. 1666*b* on its face does not purport to be a complete scheme for the regulation of weights. It does not even go far in the direction of efficient regulation. It affords little protection from a practical standpoint against a dealer who may be disposed to be dishonest or careless. We do not think it was intended to deprive cities of the power which they had before the enactment of this law to adopt such reasonable regulations in regard to weighing as were not in conflict with any statute of the state. The cases of *State ex rel. Milwaukee v. Newman,* 96 Wis. 258, 71 N. W. 438, and *Ogden v. Madison,* 111 Wis. 413, 87 N. W. 568, fully support this conclusion. We therefore hold that the city council had the right to pass an ordinance relating to weighing coal, provided it was reasonable and not in conflict with any existing state law on the subject.

The reasonableness of this ordinance is attacked on a number of grounds. Some of the attacks are based on the idea that the ordinance requires the dealer to make his sales on the basis of the weights as ascertained by the city weighmaster. Having rejected this construction of the ordinance, these particular objections drop out of the case. The principal remaining objections are the following:

(1) Plaintiff sells a large quantity of coal to farmers and others living outside of the city, to whom delivery is made at

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the yard. In order to comply with the ordinance such coal must be loaded on to one of plaintiff's wagons and hauled to the city scales and weighed. The coal must then be unloaded and reloaded on the purchaser's vehicle and the empty wagon weighed. Such procedure involves a large and a wholly unnecessary expense, inasmuch as plaintiff's scales are tested and the purchaser is himself present to see that the weighing is correctly done. (2) Plaintiff also sells coal to city customers where delivery is made at its coal yard and in reference to which the same unnecessary handling must be done that is required where sales are made to parties who haul their coal from the yard to points outside the city. (3) Plaintiff makes about one half of its deliveries of coal where the team travel is practically doubled in going to and returning from the place of delivery by reason of being obliged to go to the city scales on the outgoing and incoming trips, thus greatly increasing the expense of doing business without any corresponding benefit to the purchaser or any one else. (4) Plaintiff sells a large amount of coal in small quantities and made it a practice to fill its small orders by putting several of them in a single wagon and making all of the deliveries on one trip. Under the ordinance it must make a separate trip for each delivery and must weigh out and weigh in, thus greatly and unnecessarily increasing the cost of making such deliveries. (5) The plaintiff frequently makes deliveries after 6 o'clock in the evening and before 7 o'clock in the morning, as well as on Sundays, when the weighmaster is not required to be on duty. Such practice would have to be entirely discontinued under the ordinance. (6) The city scales are at times out of repair so as to be incapable of use and were in such condition for a period of three weeks before the action was begun. Under the ordinance the plaintiff would be precluded from selling any coal at such times. (7) The singling out of coal dealers and requiring them to pay a fee of ten cents for weighing each delivery is an arbi-

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trary and unreasonable discrimination against such dealers. (8) The ordinance in fact is of no benefit to the purchaser of coal if it is construed as not requiring the dealer to sell on the weight as determined by the city scales, because it does not furnish any efficient method by which the purchaser can determine what weight the city scales showed. (9) It would cost not less than seventy-five cents per ton to comply with the terms of the ordinance, which expense is altogether out of proportion to any benefit that would result therefrom.

It does not follow that because there may be some provisions of this ordinance which the court might deem unreasonable the entire ordinance must be declared void. Unless the court can say that the void parts cannot be separated from the valid ones and that the whole must fall because such void parts were a compensation for the valid ones and that the valid parts would not have been enacted except in conjunction with the void ones, the ordinance should not be held bad in its entirety. Any objection that does not go to the validity of the entire ordinance need not and in fact should not be considered in a suit of this character. *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785; *State ex rel. Buell v. Frear,* 146 Wis. 291, 131 N. W. 832; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209; *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164. It is essential, however, that the part upheld form, independently of the invalid portion, a complete law in some reasonable aspect, so that it may be fairly concluded that the council would have enacted it without the invalid parts. *Water Power Cases,* 148 Wis. 124, 152, 134 N. W. 330.

We think it clear that the ordinance was passed to provide for a check on the weighing done by the dealers. It must be conceded that it is incomplete and inadequate to fully accomplish this purpose. The city weighmaster need not be advised of the name of the purchaser and is not required to keep any record showing to whom the delivery was made. It will

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be difficult if not impossible for the purchaser in many cases to identify the delivery made to him from the record of the weighmaster. The fact that the ordinance is not as comprehensive as it might be is not a sufficient reason for holding it void. If it has a reasonable tendency to accomplish the end sought and the end is a justifiable one, it should be held valid. There can be little doubt that it has such tendency. The very fact that each delivery must be weighed on the city scales will in itself tend to make the dealer more careful in the matter of weighing. The purchaser, if he so desires, may accompany the coal wagon on its return trip to the city scales and get exact information as to the weight of his coal by that scales. There are other means by which the purchaser can ascertain what the coal which he bought weighed on the city scales. So while the ordinance is not very complete, it cannot be said that it is so inefficient that it cannot bring about the desired results in a large measure.

The complaint and affidavits tend to show that the expense of complying with the terms of this ordinance will be large, and it is also said that coal is sold on a small margin. Assuming the facts to be as stated, we do not see how they can affect the validity of the ordinance. If no more than a reasonable profit is being realized by the dealers the expense must fall on the consumer. The dealers can readily add the increase in expense to the price which they formerly charged for coal and protect themselves from any loss on account of the regulation. The city council in passing the ordinance in question presumably did so in response to a demand from those who were purchasers of coal. The expense necessarily connected with the delivery of coal is just as legitimate an item to be included in the price of the commodity as is the cost of the coal at the mine or the cost of freighting it to the dealer. If the consumers are willing to pay the expense necessarily incurred in making a test weight, surely the privilege they ask should be accorded them, and we do not see wherein the deal-

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ers or any one else, except it be the consumers, have any substantial ground for faultfinding on the score of expense.

If the ordinance applies to sales made for consumption outside of the city, where delivery is made at the plaintiff's coal yard, it may be that it is unreasonably burdensome as applied to such sales. The plaintiff and other coal dealers in *Sparta* may come in competition with dealers in other places in making sales to farmers and others using coal some distance from the city. If the extra expense entailed by the ordinance is as great as is claimed, it might well prevent the *Sparta* dealers from meeting the prices made by other dealers who are not handicapped by such a regulation. We are not at all certain, however, that the ordinance was intended to apply to cases where delivery is made to the purchaser at the coal yard and where the latter has the opportunity to observe the weighing of the coal which he buys. We do not decide the point, but hold that if the ordinance is invalid as to such sales it may still be held good as to sales made for consumption within the city and where the dealer hauls the coal sold from its yard and delivers it on the premises of the consumer.

The fact that the city requires all coal to be weighed on its scales presupposes that it will furnish the scales and keep them in order and keep a man in charge of them at all times, excluding Sundays and legal holidays, when coal is customarily delivered. If it fails to provide the means of weighing it cannot punish dealers for its delinquency. They are not obliged to suspend their business or to change their methods of carrying it on further than to weigh the coal sold by them in the manner provided if they are afforded the opportunity to do so when they make their deliveries. This does not mean that they can make night deliveries to evade the ordinance. It does mean that, if in rush seasons and in exceptional cases deliveries must be made outside of the usual working hours in order to provide fuel for those in immediate need of it, the city must provide the means of weighing before it can exact the prescribed penalties for failure to weigh.

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The city had the right to place coal dealers in a class by themselves and legislate for the class, and so long as the legislation was reasonable there was no denial of the equal protection of the laws to the dealers. *Kiley v. C., M. & St. P. R. Co.* 142 Wis. 154, 125 N. W. 464; *Borgnis v. Falk Co.* 147 Wis. 327, 353, 133 N. W. 209; *Maercker v. Milwaukee,* 151 Wis. 324, 139 N. W. 199; *Cream City B. P. Co. v. Milwaukee,* 158 Wis. ——, 147 N. W. 25.

The exaction of the fee of ten cents for weighing did not render the ordinance void. It was not so large as to indicate that the real purpose of the city council was to tax the industry, or that there was any purpose in mind except to provide a fund sufficient to defray the expense of executing the law. Such a fee might be exacted. *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785. Besides, the dealer can shift the charge on to the consumer, so he is not injured by reason of the exaction.

We think the main features of the ordinance are valid and workable.

By the Court.—Order affirmed.

STATE EX REL. JOHNSON and others, Appellants, vs. HINTGEN and others, Respondents.

May 2—May 21, 1914.

Highways: Adoption as county roads: Repair: Mandamus.

1. Under a statute (sec. 1308, R. S. 1878) authorizing county boards to adopt main traveled highways as county roads, but not prescribing the method of such adoption, a formal resolution of the county board was sufficient for that purpose.
2. Conceding, but not deciding, that resolutions of a county board were not effective as an adoption because the road in question had not then been constructed or traveled and hence was not

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a "main traveled highway," a resolution passed after the opening of the highway, and evidently intended to cure every possible flaw in the former proceedings, should, although inartificially expressed, be given effect as an adoption of the highway.

3. Unless there are funds in the county treasury which may properly be used for the purpose of repairing a county highway, the county highway commissioner cannot be compelled by *mandamus* to do the work.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is a *mandamus* action brought to compel the county highway commissioner of *La Crosse County* to repair a certain highway two miles in length in the town of *Holland,* known as the McGilvary road. The petitioners are property owners along the highway who are unable to reach their property on account of the impassable condition of the road. The appellants' claim is that the road in question is a county highway and that under the provisions of sec. 1311, Stats., it has become the duty of the defendant *Hintgen* as county highway commissioner to repair the same.

The facts were undisputed. All the preliminary proceedings made requisite by sec. 1311 before the county highway commissioner is required to act were taken. Only two questions are presented in the case: (1) whether the highway is in fact a county highway; (2) if so, whether the highway commissioner can be compelled to repair it in the absence of any funds in the county treasury available for use for that purpose.

From the findings of fact it appears that the road was laid out by the town of *Holland* in the years 1891 and 1892, the damages awarded, however, being paid by the county of *La Crosse;* that the object of the road was to connect with a public bridge across Black river at the westerly terminus of the road, which bridge was built by the county in 1892, with funds partly raised by public taxation and partly obtained from the city of La Crosse, the Black River Improvement

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Company, and a number of individual subscribers; that since the opening of the road, in 1893, the county has maintained it and kept it in repair, spending large sums in grading, riprapping, and bridging the same; that the following resolutions were adopted by the county board with reference to the said road at the dates given, viz.:

On May 22, 1891:

"Resolved, that the petition presented to this board by the freeholders of the town of *Holland* relating to the adoption of the road in question and mentioned in said petition be adopted as a county road, or so much of the same as will be necessary to reach high land on said line of road; provided that the supervisors of the town of *Holland* will lay out a public highway leading from some point in the present highway now laid out to the proposed bridge site at McGilvary's ferry on Black river, such place or road to be selected by the special committee of this board provided for in the resolution adopted locating and appropriating one thousand dollars."

On May 2, 1892:

"Whereas, the county having adopted certain highways, to wit: one in the town of Campbell, and one in the town of *Holland,* therefore be it resolved, that the chairmen of these towns are requested and hereby are authorized to have charge of and care for them, and in case of broken bridge plank or any needed small repairs for the safety of the traveling public, and report the condition of these roads from time to time."

On November 13, 1894:

"Whereas, certain highways in *La Crosse County* have been adopted as county roads by the county board, namely, the road known as McGilvary road leading through the bottoms to the Black river bridge and the one known as the Abattoir road in the town of Campbell, and,

"Whereas, that in the opinion of some attorneys, said roads have not been properly put on record in the county clerk's office as such, therefore be it resolved, that a committee consisting of the chairman of board, George H. Ray, and J. L. Pettingill, together with the district attorney, and they shall be empowered and are hereby instructed to place the aforesaid

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public highway and the parts appertaining thereto properly on record in the office of the county clerk."

It further appears that in July, 1911, owing to the breaking of a dam on Black river some distance away, the road was flooded and washed away in places and has been impassable since that time, the town of *Holland* having at all times refused to repair it; that the road could be repaired so as to be reasonably fit for public travel at an expense of between $1,000 and $1,200, but that to put it in permanently good condition so as to obviate the danger of washouts in the future the expense would be from $10,000 to $12,000; that there are no county funds available for the repair.

The circuit court held that the road could not have been adopted by the county by the resolutions adopted in 1891 or 1892, because it had not then been "laid out, constructed, or traveled," and that it was not the intent of the board to adopt the road by the resolution of 1894, hence that it never became a county road. The court also held that no *mandamus* could be awarded because there were not shown to be any funds in the county treasury available for the purpose. Judgment having been entered denying the peremptory writ, the relators appeal.

The cause was submitted for the appellants on the brief of *Bunge & Bosshard,* and for the respondents *Hintgen* and *La Crosse County* on that of *David S. Law.*

WINSLOW, C. J. Sec. 1308 of the Revised Statutes of 1878 (which was in force at the time of the opening of the highway, but was repealed by ch. 337, Laws of 1911) provided that county boards might adopt any main traveled highways as county roads and thereafter cause the same to be kept in good repair so long as they remain under their control. No special provisions are contained in the statute prescribing the method of such adoption, therefore it would seem clear that a formal resolution must be held sufficient.

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Conceding, without deciding, that neither of the resolutions passed by the county board in the present case in 1891 and 1892 was effective as an adoption, because the road had not then been constructed or traveled and hence was not "a main traveled highway," we are clear that the resolution of 1894, passed after the opening of the highway, should be construed as supplying every defect that there might be in the previous resolutions. It was evidently the intent of that resolution to cure every possible flaw in the former proceedings, and under the liberal rule relating to the proceedings of such bodies, which requires the evident intent of the body to be carried out although inartificially expressed, we can entertain no doubt that the resolution should be given effect as an adoption of the highway. *Bartlett v. Eau Claire Co.* 112 Wis. 237, 88 N. W. 61.

Upon the second proposition, however, the conclusion reached by the circuit judge must be sustained. Unless there are funds in the county treasury which are available, *i. e.* which may properly be used for the purpose of repairing the highway, the county highway commissioner cannot be compelled by *mandamus* to do the work. This was the conclusion reached under a statute similar in every essential respect (sub. 2, sec. 1338, Stats. 1911) in the case of *State ex rel. Van Lyssel v. Scheuring,* 154 Wis. 93, 141 N. W. 1001.

By the Court.—Judgment affirmed.

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TOMSCYK, by guardian *ad litem*, Appellant, vs. BADGER BOX AND LUMBER COMPANY, Respondent.

May 2—May 21, 1914.

Master and servant: Injury: Directed verdict: Appeal: Review.

In an action for injuries sustained, before the common-law rules were changed by statute, by an infant employee in a box factory, whose hand came in contact with a circular saw, a judgment for defendant upon a directed verdict is affirmed, it not appearing that the trial court was clearly wrong in holding that the evidence did not raise a jury question as to defendant's liability.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action for a personal injury. Plaintiff, a boy of seventeen years of age, while in the employ of defendant, received a personal injury by his hand colliding with a circular saw at which he was working. Several grounds of actionable negligence were alleged but there was no evidence to sustain any except, possibly, as to fault in not furnishing plaintiff a suitable tool for use in performing his duties and as to not warning of the danger of doing the work with such a tool. The evidence was to this effect: Plaintiff knew of the danger of allowing his hand to come in contact with the saw. The saw was of moderate size, fixed to an arbor located beneath a saw table which was about three feet high, two feet six inches wide, and four and a half feet long. The top of the saw was about four inches above the table. In service it turned towards where plaintiff was required to stand. It was located about midway of the table. There were guides for spacing and keeping in place the boards while being passed forward in cutting operations. There was a guard, well down in the front of the saw, to protect the operator from flying sawdust. Plaintiff was required to pass short pieces of boards through the saw so as to split them into re-

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quired widths. A complete operation consisted in placing a board to be split on the table in proper position for making the desired cut; then pushing it by hand forward until the cut was partly made, then with a stick held in the right hand and placed against the upper edge of the end of the board pass it on far enough to complete the operation. The stick was about eight inches long, two inches wide, and one-half inch thick, the hand end being curved down about like a revolver handle and the other end slanted from the top toward the hand end and at an angle of about twenty degrees. The stick was designed in order that—with the stick placed against the upper edge of the board and the operator's arm held at an angle of about forty-five degrees—the board would be held firmly down to the table. Plaintiff had worked some with a split saw having rollers to do the work performed in this case by the push stick. He had worked, as when injured, about two weeks. He was shown how to operate the push stick. The one he used at first was taken away and he made another substantially like it and continued working with that up to the time of the injury. He was not warned of the danger of the stick slipping from the end of the board and thus permitting his hand to enter the danger zone of the saw. There was evidence tending to prove that such an occurrence took place resulting in his hand being severely injured.

There was evidence to the effect that the operation of putting boards through a split saw, as in this instance, was common; that in some cases rolls are used to hold the boards in place and move them forward so as to complete the operation and in some cases a hand tool is used of the kind plaintiff had, or with a notch in the end placed against the board so as to lock over the upper edge of the end, but with no guard to prevent its raising up and slipping towards the saw, as it is claimed happened in this case.

The accident happened in 1909 before the enactment of

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the statutes changing common-law rules as regards the responsibilities of the employer in such cases and the duty of the employee to protect himself from the peril of obvious dangers.

At the close of the evidence a verdict was directed for defendant and judgment was rendered accordingly.

W. E. Wheelan, for the appellant.

For the respondent there was a brief by *Goggins & Brazeau,* and oral argument by *T. W. Brazeau.*

MARSHALL, J. The judgment must be affirmed upon the ground that it does not satisfactorily appear that the trial court was clearly wrong in holding that the evidence did not raise a jury question as regards defendant's liability.

By the Court.—So ordered.

POLLY and wife, Respondents, vs. GUMNEY, Appellant.

May 2—May 21, 1914.

Mortgages: Deed absolute in form: Security for debt.

1. A conveyance of land by deed absolute on its face, when given as security for a debt, is a mortgage.
2. Findings in this case to the effect that there was no sale of the land, but merely a conveyance of it to secure a debt, are *held* to be supported by the evidence.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This action was brought for the purpose of declaring an instrument, on its face a deed, a mortgage, given as security for a debt, and to redeem the mortgaged premises. The facts involved sufficiently appear from the findings of the court below, which are substantially as follows:

That on and prior to January 1, 1907, the plaintiff *John*

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F. Polly was the owner and in possession of the land described in the complaint; that on said day the plaintiff borrowed from one Edgar Starks the sum of $2,360 for five years with interest at seven per cent. per annum, secured by a warranty deed of the lands described in the complaint, upon the express condition that the said Edgar Starks would reconvey said premises upon the payment of said sum, together with interest thereon; that said deed and contract were duly witnessed and acknowledged and duly recorded in the office of the register of deeds for Portage county, Wisconsin, on the 5th and 7th days of January, 1907, respectively; that the plaintiffs remained in possession and had the use and benefit of said lands from the time of making the deed to Edgar Starks, and were at the time of the commencement of this action and are still in possession of the premises; that on the 29th day of January, 1910, the plaintiff *John F. Polly* borrowed from the defendant the sum of $2,750, to be repaid with interest at the rate of six per cent. per annum, interest to be payable annually; that said indebtedness was contracted and agreed should be secured by a transfer of the title to the real estate described in the complaint as hereinafter set forth; that originally the agreement was that the principal was to be repaid in three years, but that, to satisfy the repeated demands of the plaintiffs that the defeasance be executed as agreed upon, the defendant agreed that the principal could be repaid at any time; that out of the said sum of $2,750 so received from the defendant the plaintiff caused to be paid to Edgar Starks $2,360 and interest then due and owing; that said Edgar Starks, at the request of the plaintiff and with the consent of the defendant, conveyed by warranty deed the premises described in the complaint to the defendant; that the balance of said $2,750 was used to pay other indebtedness which the plaintiff then had outstanding; that said warranty deed from Edgar Starks to the defendant was authorized by the plaintiff and accepted by the defendant as

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security for the repayment of said $2,750 and interest, and said warranty deed was accepted by the defendant as such and for no other purpose; that said warranty deed was duly witnessed, acknowledged, and recorded in the office of the register of deeds for Portage county, Wisconsin, on the 1st day of February, 1910; that to further carry out said agreement the plaintiff did on the 29th day of January, 1910, make, execute, and deliver to said Edgar Starks a quitclaim deed of the said premises, which deed was duly witnessed, acknowledged, and recorded in the office of the register of deeds for Portage county on the 1st day of February, 1910; that on the 29th day of January, 1910, the plaintiffs were in possession of said premises and continued to remain in possession thereof and receive the rents, issues, and profits thereof, and that the defendant has never been in possession of said premises under his said deed, nor has he received any of the rents, issues, or profits thereof except the payment of the interest upon the money so loaned; that on the 11th day of January, 1913, the plaintiff *John F. Polly* tendered the defendant, *Albert Gumney,* in legal tender money of the United States, the sum of $2,750, together with interest thereon at six per cent. to the 29th day of January, 1913, and the amount of taxes that the said defendant had paid on said premises for the year 1911; that on said day and at the same time the plaintiff tendered to the defendant a good and sufficient deed of conveyance of the said lands and premises and requested him, in the presence of two witnesses and a notary public, there to receive his acknowledgment of said deed, requested and demanded that the defendant receive and accept the sum of $2,750, taxes and interest thereon, and to execute and deliver to said plaintiff *John F. Polly* said deed so tendered to him, but the defendant refused to accept said sum so tendered or to execute and deliver to the plaintiff a deed of said premises, but insisted and claimed that he was the owner thereof and that the plaintiff was in possession of said premises as

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his tenant; that the plaintiff still has said money on deposit in the Security Bank of Amherst Junction, Wisconsin, to make good his tender so made to the defendant on the 11th day of January, 1913, and the same has been kept ready by the plaintiff to be paid over to the defendant at any time that the defendant would accept the same; that the plaintiff *Tony Polly* is the wife of *John F. Polly,* plaintiff, and has an inchoate dower interest in said lands, and that she joined in said conveyance for the purpose of barring her dower in said lands; that there is due and owing to the defendant by the plaintiff at the time of the commencement of this action for

Principal	$2,750 00
Accrued interest	495 00
For taxes for 1911	24 85
For taxes for 1912	25 52
Total	$3,295 37

That the plaintiff has paid to the defendant $367, leaving a balance due at the time of the commencement of this action of $2,928.37; that the value of said premises was in January, 1910, $5,000..

The court concluded: That the warranty deed from Edgar Starks and wife to *Albert Gumney,* dated January 29, 1913, recorded February 1, 1910, was and is in effect a mortgage; that the plaintiff is entitled to redeem from the said deed herein declared to be a mortgage upon payment to the defendant of the sum of $2,928.37, less the costs and disbursements of this action; that within twenty days after the entry of this judgment herein the defendant, *Albert Gumney,* do make, execute, and deliver to the plaintiff *John F. Polly* a good and sufficient deed of conveyance of said premises described in the complaint; that upon the said defendant so making, executing, and delivering said deed, the plaintiff do forthwith pay to the defendant said sum of $2,928.37, less the costs and disbursements of this action; that if the defendant fail to so make, execute, and deliver said deed, then that the judg-

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ment provide that, upon the plaintiff paying said sum of money so found due by him to the defendant into the office of the clerk of this court, the judgment act as a deed of conveyance conveying all the right, title, and interest of the defendant, *Albert Gumney,* in and to said premises to the plaintiff *John F. Polly;* that the plaintiff have and recover of and from the defendant, to be deducted out of the moneys due by the plaintiff to the defendant, his costs and disbursements to be taxed herein.

Judgment was rendered in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

A. L. Smongeski, for the appellant.

For the respondents the cause was submitted on the brief of *D. I. Sicklesteel.*

KERWIN, J. There is really but one question on this appeal, namely, whether the findings are supported by the evidence.

It is insisted by appellant that there was a sale of the property and that the deed on its face shows that the transaction was a sale of the land, not a conveyance of it as security for a debt. It is well settled by the decisions of this court that a conveyance of land by deed absolute on its face, when given as security for a debt, is a mortgage. *Smith v. Pfluger,* 126 Wis. 253, 105 N. W. 476. The evidence amply supports the findings to the effect that the transaction was not a sale of the land, but merely a conveyance of it to secure a debt.

All the findings are well supported by the evidence, therefore the judgment must be affirmed.

By the Court.—The judgment is affirmed.

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MELDRUM, Respondent, vs. SOUTHWICK-SELLERS LAND COMPANY, Appellant.

May 2—May 21, 1914.

Real-estate brokers: Commissions: Procuring cause of sale: Prior negotiations between principals.

1. A broker employed to find a purchaser for real estate may be the procuring cause of a sale and entitled to a commission thereon, if he initiates the negotiation which results in such sale, notwithstanding the principals in the transaction had previously negotiated with each other in respect to the purchase and sale of the same property, provided such prior negotiations had been abandoned before his intervention.
2. The abandonment of negotiations is one thing, abandonment of the purpose to buy or sell another.
3. If the owner abandons direct negotiations with a possible purchaser for the purpose of beginning anew through another channel and thereby obtaining a better price, the broker of whose services he knowingly avails himself in carrying out that purpose is entitled to compensation.
4. The evidence in this case is *held* to sustain findings by the jury that prior negotiations with the purchaser had been broken off and that the plaintiff was the procuring cause of a sale.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The defendant was a corporation controlled by E. W. Sellers with headquarters at Stevens Point, Wisconsin. It owned land in Northern Wisconsin which it desired to sell. The plaintiff was a real-estate agent residing at Park Falls, Wisconsin. The defendant employed the plaintiff as its agent to procure a purchaser for its lands generally at $10 per acre, or such other price down to $8 per acre as might be satisfactory to defendant. It promised to pay the plaintiff a commission of $1 per acre for lands sold by it to any purchaser procured by plaintiff. The Wisconsin Realty Company was a corporation controlled by E. P. Sherry, with headquarters at Milwaukee and having an agent named Saunders at Park

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Falls. It desired to buy the tract of land in question, being part of that which the defendant had for sale. F. R. Sellers, an agent of the defendant, resided at Milwaukee.

Commencing March 21, 1911, Mr. Sherry for the Wisconsin Realty Company and Mr. E. W. Sellers for the defendant were engaged in negotiations by correspondence for the purchase of the tract of land in question until July 27, 1911, when at a personal interview at Milwaukee between Mr. Sherry and F. R. Sellers the former made an offer of $8 per acre for the land. July 28, 1911, E. W. Sellers wrote Mr. Sherry to the effect that he could not consider an offer of $8 an acre for the land with the growing timber. The next day Mr. Sherry answered, saying he did not want to buy the timber without the land, that he might feel like renewing his offer of $8 per acre, but required an immediate answer. Mr. E. W. Sellers did not reply to this letter, and the correspondence between E. W. Sellers and Mr. Sherry ceased until November 17, 1911. The evidence would indicate that E. W. Sellers and Mr. Sherry was each quite a consummate tactician in the making of land sales or purchases. September 11th E. W. Sellers wrote to the plaintiff at Park Falls suggesting that the latter get busy and put over a deal of this land before the land was sold, and plaintiff answered the next day, saying that he had kept himself quite busy on this plat of land and had been talking with Mr. Saunders and that the latter wished for his lowest price and also the estimates on this land. E. W. Sellers claims he did not know Saunders was the agent of the Wisconsin Realty Company, and the plaintiff did not know that E. W. Sellers was or had been in negotiation with the Wisconsin Realty Company. September 18th E. W. Sellers wrote Saunders inclosing a plat of the land and making a price on the timber only, and on the same day sent a copy of this letter to the plaintiff. September 20th Saunders transmitted this to Mr. Sherry at Milwaukee, and on the next day the latter wrote Saunders suggesting that he

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did not understand why E. W. Sellers had written to him, but supposed that E. W. Sellers did not know that Saunders was associated with the Wisconsin Realty Company. He also suggested to Saunders that the latter should not write to Sellers on the Wisconsin Realty Company stationery, and suggested an offer of between $7 and $8 per acre if time was given upon part of the purchase price. He also stated in substance that his company would pay $8 per acre, but did not authorize that offer to be then made. September 25th Saunders wrote E. W. Sellers, as suggested by Sherry. September 26th Sellers replied to Saunders, rejecting the proposition of the latter. September 27th plaintiff wrote to E. W. Sellers informing him of progress of plaintiff's negotiations with Saunders and that Saunders was representing a company which would prefer to buy the land with the timber and that E. Sherry of Milwaukee was one of the largest stockholders of this company. September 28th Saunders wrote to Sellers asking his lowest price, etc. September 29th E. W. Sellers wrote Saunders, fixing a price for the land and timber at $12.50 per acre. On the same date E. W. Sellers wrote to plaintiff informing the latter that he had received an offer of $7 to $8 per acre from Saunders which he declined and also informing plaintiff that he, Sellers, had not heard from Mr. Sherry and would advise plaintiff promptly if he did. Also inclosed a copy of the letter of September 29th which he had written to Saunders. September 30th Saunders sent E. W. Sellers's letter of September 29th to Sherry and suggested, among other things, "we apparently have got them going a little. The question we are up against now is how much more they will shade their price. They are evidently hard up and need some ready money." He asked Sherry for further instructions. October 2d Sherry wrote Saunders suggesting that the latter offer $8 per acre for the land and timber, one fourth cash, balance in one, two, three, and four years, with five per cent. interest. Also stating that he might

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feel like going up to $9 per acre provided the terms were satisfactory, but adding: "You need not say that to them now." October 2d Saunders wrote to E. W. Sellers as suggested in the letter of Sherry to Saunders of this date. October 3d plaintiff wrote E. W. Sellers acknowledging receipt of the letter of the latter to him of September 29th, saying also that he had since talked with Saunders and thought they were going to examine the lands and calling for the estimates. October 7th E. W. Sellers wrote to plaintiff informing the latter of Saunders's offer of $8 per acre and that he would not accept it. Also inclosing a diagram and estimates and stating: "I hope you will be successful with some one else." October 11th Saunders wrote Sherry making suggestions relative to strategy of offers, including a suggestion that Sherry take the matter up with E. W. Sellers inasmuch as Sherry had had some previous correspondence with Sellers. October 12th Sherry wrote Saunders that he did not think it advisable for him to take the matter up with E. W. Sellers, but that correspondence should be carried on by Saunders, and suggested that the latter offer to pay a little more cash down. October 14th Saunders wrote E. W. Sellers requesting an answer to his letter of October 2d and intimating that his parties would make a larger cash payment if necessary. October 18th plaintiff wrote Sellers a letter containing this statement: "Received yours of the 11th stating that you had heard from Mr. Saunders and he had made you an offer of $8. Well, I have been talking with Mr. Saunders since and some others, but the best offer I have been able to get is about $9 so far, with a payment of about half down." October 27th E. W. Sellers wrote to plaintiff acknowledging receipt of plaintiff's offer of about $9 with a payment of about half down and offering to sell for $10 per acre, half cash, etc. And further stating that he, E. W. Sellers, will come to Park Falls for a personal interview and to arrange details. October 30th Saunders wrote Sherry that plaintiff had been trying to sell this land and had been to see him several times

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about it, and further stating in substance that he had an offer from plaintiff at $9 per acre and requesting instructions. October 31st plaintiff wrote E. W. Sellers that Saunders was manager of the Wisconsin Realty Company and would have to consult with Sherry. It would not be necessary for E. W. Sellers to come to Park Falls, as the head office of the company was in Milwaukee and they would most likely prefer to do the business there. October 31st Sherry wrote Saunders stating that F. R. Sellers had been at his office in Milwaukee with a letter from his brother, E. W. Sellers, stating that he had an offer of $9 per acre from some one at Park Falls and suggesting that it probably referred to the plaintiff, *Mr. Meldrum.* The letter also informs Saunders that Sherry had said to F. R. Sellers that the best they could do was $8 per acre, which would amount to $4,144, or that they might pay an even $4,200 for the land, and pay all cash if promptly accepted. The letter then suggests: "If *Mr. Meldrum* has any more talk with you, we would suggest that you advise him that you would want time on a considerable portion of it. He talked as though they were in very urgent need of funds and wanted to know how quickly it could be closed up. It is our opinion that our offer is the nearest that they have had to making a trade on it, and it might be possible that we could secure it at $4,200 if we can arrange to pay cash." November 17th Sherry wrote E. W. Sellers as if he were taking up the old negotiations by correspondence apparently broken off on July 29th. November 20th E. W. Sellers wrote Sherry saying: "We have your esteemed favor of the 17th inst. and do not find anything on this timber subject since July 29th offering $8 per acre for the land and timber." He then offers to sell for $10 per acre. November 20th E. W. Sellers wrote plaintiff transmitting him a copy of the letter of November 17th from Sherry to him and suggesting that the Wisconsin Realty Company were old customers and customers of his brother, F. R. Sellers, and stating that he did not know they were the same people plaintiff had been figuring with. He

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also suggested that although plaintiff in his letter of October 31st (September 7th?) mentioned a Mr. Sherry they did not know he was the same Mr. Sherry connected with the Wisconsin Realty Company. He suggested that if the deal went through, "there is you and Mr. Saunders and my brother at least to satisfy." He informed plaintiff of the stage at which the negotiations had arrived, and then: "Now that you are fully advised in the premises you can act accordingly, and would be glad to have you keep us fully advised." November 21st E. W. Sellers went to Milwaukee and closed the deal with Mr. Sherry at $8.70 per acre. November 23d plaintiff wrote E. W. Sellers acknowledging receipt of the foregoing letter of November 20th. November 29th E. W. Sellers wrote plaintiff saying that the deal with the Wisconsin Realty Company was not closed. He hoped it would be, and wanted to know what division of commission would be satisfactory to the plaintiff. December 13th E. W. Sellers wrote plaintiff stating that he closed up the deal with the Wisconsin Realty Company, but held up the payment of commissions until he could hear from plaintiff. This letter contains the following: "You understand that the Wisconsin Realty Company had been clients of ours; have sold them before; and we have figured with them for a year or more, and they have had a standing offer for this timber for some months and we did not know that you were figuring with the same people."

The defendant offered to show by Mr. Sherry that the act of *Mr. Meldrum* in talking with Mr. Saunders about the transaction did not influence Sherry's judgment in any way about the land. The court excluded this evidence. The court instructed the jury as follows:

"A broker will be deemed the procuring cause of a sale if his intervention is the foundation upon which the negotiation resulting in the sale is begun. He is the procuring cause if it appears that the sale is the result of his, the broker's, initiative. . . . The broker may be the procuring cause of a

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sale notwithstanding the fact that the owner of the property and the purchaser, prior to the broker's becoming interested in the matter, negotiated with each other in relation to the sale and purchase of the property, provided these negotiations had ceased—had been abandoned—without resulting in an understanding, and negotiations afterward initiated by the broker resulted in bringing about a sale between the owner and the party the owner had previously negotiated with. A broker cannot be said to be the procuring cause of a sale of real estate merely because he invites it to the attention of another who is already in active negotiation for its purchase; nor because he mentions to the owner as a possible purchaser one with whom the owner is already treating, when the final purchase results from a continuation of such pre-existing negotiations, unaffected by the broker's act. Under this rule of law the plaintiff is not the procuring cause of the sale to the Wisconsin Realty Company, if you are satisfied by the evidence that negotiations opened up by the Wisconsin Realty Company in March, 1911, were not abandoned and terminated by the defendant, and the actual sale was unaffected by the plaintiff's acts. But if you find from the evidence that the defendant on the receipt of the letter from the Wisconsin Realty Company dated July 29, 1911, Ex. 112, abandoned the negotiations with the Realty Company, so that the negotiations ceased to be active negotiations, without any understanding that they should be renewed in the future, then, if you also find from the evidence that the plaintiff thereafter, in September, 1911, started negotiations through the agent, Saunders, and set in motion negotiations, for a time conducted them with Saunders under Sellers's instructions, which negotiations Sellers and the Realty Company finally took up directly one with the other, and which negotiations thereafter finally resulted in the sale on November 21st, the plaintiff would be, under such state of facts, the procuring cause of the sale."

The case was submitted to the jury upon special verdict consisting of two questions, as follows:

"(1) Was the contract between the plaintiff and defendant, made July 24, 1909, providing for a commission of one dollar an acre, modified in April, 1910, so that in lieu of a commission of one dollar the commission should be five per

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cent. of the purchase price of the land with the timber thereon? *A.* No.

"(2) Was the plaintiff the procuring cause of the sale by the defendant to the Wisconsin Realty Company in November, 1911? *A.* Yes."

The appellant assigns error as follows: (1) In denying its motion to direct a verdict in its favor; (2) in denying its motion to answer the second question of the special verdict in the negative; (3) in instructing the jury; (4) and (5) in several other particulars depending upon the foregoing; (6) in rulings upon evidence.

For the appellant there was a brief by *Fisher, Hanna & Cashin,* and oral argument by *W. E. Fisher.* They cited *Sexton v. Goodrich,* 131 Wis. 146, 111 N. W. 206; *Burdon v. Briquelet,* 125 Wis. 341, 104 N. W. 83; *Burd v. Webster,* 128 Wis. 118, 107 N. W. 23; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513; *Chase v. Woodruff,* 133 Wis. 555, 113 N. W. 973; *Richards v. Noyes,* 44 Wis. 609; *State Bank v. Dutton,* 11 Wis. 371; *Johnson v. Wilson,* 1 Pin. 65; *Gibbon v. Hughes,* 76 Wis. 409, 45 N. W. 538; *Taylor v. Tigerton L. Co.* 134 Wis. 24, 114 N. W. 122; and many cases in other states.

For the respondent the cause was submitted on the brief of *Holland & Lovett,* attorneys, and *Geo. B. Nelson,* of counsel. They cited *Stewart v. Mather,* 32 Wis. 344; *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; *Burdon v. Briquelet, supra; Oliver v. Katz,* 131 Wis. 409, 111 N. W. 509; *Zitske v. Grohn,* 128 Wis. 159, 107 N. W. 20; and many cases in other states.

TIMLIN, J. This case presents some fairly difficult questions. It would seem that Mr. Sherry, from the early part of March, 1911, until the closing up of the transaction on November 21, 1911, entertained a persistent desire to purchase this land if he could get it at his price. It also seems that defendant during this time was actuated by a persistent desire to sell this land at its higher price. There was there-

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fore no abandonment of the project from this personal and mental viewpoint. But abandonment of negotiations is one thing, abandonment of the purpose to buy or sell another. The purpose to buy or sell usually means to buy or sell at a satisfactory price, but not if such price is unattainable. At the same time there is evidence tending to show that E. W. Sellers, representing the defendant, and Mr. Sherry, representing the purchaser, each sought for strategic purposes to impress the other with the belief that the negotiations were at an end and abandoned. Each immediately and for the purpose of helping out this deception invited another and subordinate agent of the seller and buyer to open what appeared to the plaintiff to be original and new and independent negotiations. The defendant as seller at this stage enlisted the activities of the plaintiff, its agent, and the Wisconsin Realty Company as buyer enlisted the activities of Mr. Saunders, its agent. Saunders knew of the former negotiations between the principals, but was in substance instructed to conceal the fact that he was acting for the Wisconsin Realty Company, and he did so. The plaintiff knew that Saunders was acting for the Wisconsin Realty Company, but did not know of the existence of the prior negotiations by his principal with that company. The defendant knew that the plaintiff was negotiating a sale with Saunders, but professes not to have known that Saunders was the agent of the Wisconsin Realty Company represented by Mr. Sherry. It had early information sufficient to put it upon inquiry that this was the fact, and after having positive information that this was the fact it authorized or permitted the plaintiff to proceed with his negotiations.

We think that under the circumstances the jury was authorized to find that the first direct negotiations were abandoned for the purpose of beginning anew through another channel and thereby obtaining more satisfactory results. The defendant might well be held to the position it assumed in this regard. The jury might infer from the evidence that

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the defendant chose to discontinue the first direct negotiations and to negotiate through the plaintiff for the purpose of thereby obtaining a better price and so making a sale. Knowing that the plaintiff was acting for it under a contract which called for a commission, it availed itself of his services to obtain a higher price. There is also evidence from which the jury might infer that E. W. Sellers knew that the plaintiff was negotiating with the Wisconsin Realty Company through Saunders at least as early as September 27th. Having arrived at the conclusion that there was evidence to support a finding that the first negotiations had been abandoned and broken off, whether with intent to give up the idea of buying and selling or for strategic purposes, it was properly a question of fact whether the plaintiff's efforts were the procuring cause of the sale which was afterward consummated upon terms better for the seller than those theretofore offered by the purchaser, and a little less than those which apparently could have been secured by plaintiff had the closing up of the transaction remained in his hands. *Burdon v. Briquelet,* 125 Wis. 341, 104 N. W. 83; *Hoadley v. Savings Bank,* 71 Conn. 599, 42 Atl. 667; *Rounds v. Allee,* 116 Iowa, 345, 89 N. W. 1098, and cases in briefs of counsel, *supra.*

It follows that there was no error in refusing to direct a verdict for the defendant or in refusing to change the answer to the second question of the special verdict. The instructions to the jury were appropriate to the case of an abandonment of prior negotiations between the principal and the buyer and a subsequent sale of which the broker was a procuring cause, and while they might have been more full in view of the peculiar character of the evidence, still they contain nothing incorrect. We find no reversible error in the rulings upon evidence. The judgment is as near to the justice of the case as it is possible to arrive, and no rule of law was violated, so we have concluded to affirm.

By the Court.—Judgment affirmed.

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POLEBITZKE and another, Respondents, vs. JOHN WEEK LUMBER COMPANY, Appellant.

May 2—May 21, 1914.

Deeds: Construction: Easements: Limited fees: Conditions subsequent.

1. Deeds, like other instruments, should be construed so as to arrive at the intention of the parties. If there is no ambiguity, this must be arrived at from the language used; and effect should be given to all of the provisions if that be possible without doing violence to the language.
2. In the case of an easement the title does not pass, but only a right of use or privilege in the land of another; while in the case of a limited fee the title does pass, even though the use be limited.
3. The grant of a fee may be coupled with a restriction upon the right of use, and such restriction may be in the nature of a condition subsequent or a mere covenant, depending on circumstances.
4. Conditions subsequent must be created either in express terms, as by a statement of the condition coupled with a reverter clause, or by clear implication; and they are most strongly construed against the grantor.
5. A deed conveying a strip of land one rod wide bordering on a river, "for the purpose of rafting and boomage," and containing the usual granting clause appropriate to convey a fee, together with the ordinary *habendum* clause and covenants of warranty, is *held* to convey at least a limited fee in the strip of land described, for the use specified, and to entitle the grantee and its assigns to permit logs drifted thereon in the course of being driven down the river to a boom below, to remain there as long as desired without liability for trespass.
6. The words "for the purpose of rafting and boomage" in such deed are entirely inadequate to create a condition subsequent.
7. It may be that if such strip of land were put to some different use which materially interfered with the use and enjoyment of the grantor's adjoining land, that use might be enjoined by a court of equity and the damages resulting therefrom might be recovered, but this is not decided.

APPEAL from a judgment of the circuit court for Portage county: A. H. REID, Judge. *Reversed.*

This is an action for trespass. The complaint alleged that

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between April 20, 1906, and October 20, 1910, plaintiffs were the owners in common and in possession of the following described premises:

"All of lots 1 and 2 and the north four and six-tenths acres of lot 3, and the northwest quarter of the southeast quarter, all in section 15, township 24 north, of range 7 east, excepting a strip of land one rod wide along the meandered shore bordering on the Wisconsin river, including lakes and bayous leading into the Wisconsin river, for the purpose of rafting and boomage, with all the rights and privileges pertaining thereto, being on lots 1 and 2 in said section, township and range aforesaid."

That between the above dates the defendant floated its logs past the plaintiffs' premises during the spring of each year when the water was high and unlawfully allowed part of said logs to drift upon and remain each year on plaintiffs' property after the water receded to its normal level, and that during the summer of each year the defendant in removing said logs tore up the sod and tramped down the grass on twenty-eight acres of plaintiffs' premises, by reason of which they were prevented from harvesting crops of hay and from pasturing fifteen acres of land, to their damage in the sum of $379.50.

The answer of the defendant alleged that the logs when floated down the river were stored in what is known as the Stevens Point Boom Company's boom, the upper divide of which is less than a mile from the land above described; that on January 28, 1888, the Webster Manufacturing Company conveyed to the Stevens Point Boom Company the strip of land above described, which deed of conveyance was duly recorded, and that the defendant as a patron of the Stevens Point Boom Company has the right to use said strip of land for the purpose of rafting, boomage, and driving its logs down the Wisconsin river and into the company's boom and that it has never exercised any rights other than those to which it is entitled by virtue of said conveyance. By the deed from

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the Webster Manufacturing Company to the Stevens Point Boom Company, the grantor "granted, bargained, sold, remised, released, aliened, conveyed and confirmed, and by these presents does give, grant, bargain, sell, remise, release, alien, convey and confirm unto the said parties of the second part, its successors and assigns forever, the following described real estate situated in the county of Portage and state of Wisconsin, to wit." Then follows a description of a parcel of land by metes and bounds said to contain 9.52 acres. This was followed by the conveyance of two other strips of land not involved in this action. The deed then continues:

"Also a rod wide along the meandered shore bordering on the Wisconsin river, including lakes and bayous leading into the Wisconsin river, for the purpose of rafting and boomage, with all the rights and privileges thereunto pertaining, being on lots number 1 and 2 of section 15, in township number 24, range 7 east. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; and all the estate, right, title, interest, claim or demand whatsoever of the said parties of the first part, either in law or equity, either in expectancy of or possession, in and to the above bargained premises and their hereditaments and appurtenances. To have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said parties of the second part, and to its successors and assigns, forever."

Then follows the usual warranty clause.

The jury returned a verdict in favor of the plaintiffs, and in accordance with such verdict judgment was entered. From such judgment defendant appeals.

For the appellant there was a brief by *Fisher, Hanna & Cashin,* and oral argument by *W. E. Fisher.*

A. L. Smongeski, for the respondents.

Barnes, J. As we read the complaint, no claim is made in it for any damages resulting from permitting logs to lie on the part of lots 1 and 2 of section 15, township 24 north,

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of range 7 east, conveyed by the Webster Manufacturing Company to the Stevens Point Boom Company. We find the following admission in the record, made by plaintiffs' counsel near the close of the trial: "I admit that we have no right—that is, the plaintiffs—to a strip of land one rod bordering on the Wisconsin river, and the bayou." It was stipulated on the trial that the Webster Company owned this parcel of land when it conveyed the same and that the defendant had acquired such right to use this strip as the Boom Company possessed under this deed. It was also stipulated that the plaintiffs obtained their title through mesne conveyances from the Webster Company. There is no claim but that the conveyance to the Boom Company was prior in point of time or that its deed was not seasonably recorded. The conveyance from the Webster Company under which plaintiffs claim does not appear to be in the record, so we have no means of knowing what recitals such deed contains. This is not material, however, the priority of the deed to the Boom Company being conceded. The circuit court construed this deed as granting an easement only, and charged the jury as follows:

"This right of rafting and boomage does not, however, include any right to allow logs to remain on this strip for a considerable period after they shall have lodged and the water has receded; nor the right to go on and remove the logs after they shall have so remained there, without paying for the injury occasioned by such remaining and subsequent removal.

"You are to consider whether the defendant in any or all of the years 1906, 1907, 1908, 1909 and 1910, allowed its logs to lodge and remain upon the one-rod strip longer than was reasonably necessary for their removal, . . . and in case you find that it did, then you should return a verdict in favor of the plaintiffs for the amount of such damage."

The defendant excepted to each of these paragraphs of the charge. We find it difficult to ascertain from the evidence to what extent logs were permitted to remain on plaintiffs'

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land outside of the one-rod strip, but there can be no doubt that damages were allowed under the charge for permitting them to remain on the parcel of land conveyed to the Boom Company. If the charge was incorrect the judgment must be reversed, and the only question presently involved is the extent of the rights acquired in this strip by the Boom Company under its deed.

In construing deeds, as in construing other instruments, the courts aim to arrive at the intention of the parties. Where there is no ambiguity in the language used, the intent must be arrived at from such language. *Chicago, M. & St. P. R. Co. v. H. W. Wright L. Co.* 123 Wis. 46, 50, 100 N. W. 1034; *Barkhausen v. C., M. & St. P. R. Co.* 142 Wis. 292, 297, 124 N. W. 649, 125 N. W. 680; *Wallis v. First Nat. Bank,* 155 Wis. 306, 314, 143 N. W. 670. And it is the duty of the court in construing a deed to give effect to all of the provisions therein found if it can be done without doing violence to the language used. *Chicago, M. & St. P. R. Co. v. H. W. Wright L. Co., supra; Williams v. Jones,* 131 Wis. 361, 111 N. W. 505.

An easement is something quite different from a fee or a limited fee. In the one case title does not pass, but only a right of use or privilege in the land of another. In the other cases the title does pass even though the use be limited. The granting clause in this deed contains the most appropriate language that could be devised by expert conveyancers to convey a fee, except as it may be modified by the words "for the purpose of rafting and boomage." The *habendum* clause is the one usually found in common-law forms of warranty deeds, as is the covenant of warranty. If the quoted words grant an easement only, then they are repugnant to the preceding words of grant contained in the deed, as well as to what follows. The grant of a fee may be coupled with a restriction of the right of use. This being so, a deed such as the one before us can be construed so as to give effect to every

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part of it. The restriction may be a condition subsequent or a covenant, depending on circumstances, but we think it has rarely if ever been held that it creates an easement.

The following cases hold that a grant of land coupled with a restriction as to use conveys the fee and not a mere easement in the thing granted: *Messer v. Oestreich,* 52 Wis. 684, 10 N. W. 6; *Towne v. Salentine,* 92 Wis. 404, 66 N. W. 395; *Strong v. Doty,* 32 Wis. 381; *Thorndike v. Milwaukee A. Co.* 143 Wis. 1, 12, 13, 126 N. W. 881; *Rawson v. School Dist.* 7 Allen, 125; *Barker v. Barrows,* 138 Mass. 578, and cases cited; *Abbott v. Curran,* 98 N. Y. 665; *Vail v. Long Island R. Co.* 106 N. Y. 283, 12 N. E. 607; *Wilkes-Barre v. Wyoming H. & G. Soc.* 134 Pa. St. 616, 19 Atl. 809; *Fitzgerald v. Faunce,* 46 N. J. Law, 536; *Downen v. Rayburn,* 214 Ill. 342, 73 N. E. 364; *Newpoint Lodge v. School Town,* 138 Ind. 141, 37 N. E. 650; *Farnham v. Thompson,* 34 Minn. 330, 26 N. W. 9. A number of these cases also hold that the restriction clause does not create a condition subsequent where there is no provision for reversion in case the property is put to a different use from the one specified.

Had the provision restricting the use to which the strip conveyed might be put been followed by a reverter clause in case the land was put to different use, a condition subsequent would or at least might have been created. *Lawe v. Hyde,* 39 Wis. 345.

Under some circumstances restrictions or provisions in a deed will be held to create a condition subsequent without a reverter clause. *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165; *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 412, 120 N. W. 277; *Drew v. Baldwin,* 48 Wis. 529, 4 N. W. 576; *Delong v. Delong,* 56 Wis. 514, 14 N. W. 591. Such conditions, however, must either be created in express terms or by clear implication and are strictly construed. *Burgson v. Jacobson,* 124 Wis. 295, 102 N. W. 563; *Wier v. Simmons,* 55

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Wis. 637, 13 N. W. 873. And they are most strongly construed against the grantor. *Mills v. Evansville Seminary,* 58 Wis. 135, 15 N. W. 133.

There is absolutely nothing in the record here to show that there was any intention to create a condition subsequent, aside from the inference that should be drawn from the recital that the land was to be used for rafting and boomage purposes. This language is in itself entirely inadequate to create such a condition. *Brugman v. Noyes,* 6 Wis. 1; *Strong v. Doty,* 32 Wis. 381; *Thorndike v. Milwaukee A. Co.* 143 Wis. 1, 126 N. W. 881; *Horner v. C., M. & St. P. R. Co., supra,* and cases above cited; *Downen v. Rayburn* (214 Ill. 342, 73 N. E. 364), 3 Am. & Eng. Ann. Cas. 36, and cases cited in note, p. 38; *Adams v. First Baptist Church* (148 Mich. 140, 111 N. W. 757), 12 Am. & Eng. Ann. Cas. 224, and cases cited in note, p. 227. The only case we have found in this state which might be said to conflict in any way with what has been said is *Pepin Co. v. Prindle,* 61 Wis. 301, 21 N. W. 254, and it was there admitted by counsel for the county that the deed contained a condition subsequent.

Circumstances might arise where the strip of land in question might be put to some use that would materially interfere with the use and enjoyment by the plaintiffs of the adjoining land which they own. In such a case it might well be that a court of equity would enjoin such use and that the damages resulting therefrom would be recoverable. The question is not before us. The Boom Company had the right to permit logs to lie on this strip as long as it desired, and so did the defendant. The Boom Company is the owner of at least a limited fee in this strip of land with the privileges and appurtenances belonging thereto, and plaintiffs are not entitled to collect any damages because logs were permitted to lie thereon. The charge of the court was erroneous and the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for a new trial.

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POMAINVILLE and another, Executors, Respondents, vs. CITY of GRAND RAPIDS, Appellant.

May 4—May 21, 1914.

Municipal corporations: Widening streets: Assessment of benefits: What lands assessable: Statutes: Construction: Estoppel.

1. Sec. 925—167, Stats. 1911, providing for assessment of benefits and damages by reason of the condemnation of land for the widening of a street, does not authorize a city to assess benefits against any land unless the owner thereof also owns some portion of the land condemned. In the phrase "the benefits which will . . . accrue to *his* lands in the vicinity of the condemned land," the insertion, in the Statutes of 1898, of the word "his," which did not appear in the original enactment (sec. 167, ch. 326, Laws of 1889—which was specifically repealed), cannot be held to have been the result of inadvertence or mistake.
2. Where, in such a case, there was an entire lack of jurisdiction on the part of a city to make any assessment against certain lands, executors of the estate owning such lands are not estopped to challenge the validity of the assessment by the fact that one of them, in his individual capacity, appeared before the board of public works and stated that he made no objection to certain assessments of benefits against his lands, none of which were taken.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action by the executors of the estate of Frank Pomainville, deceased, to set aside special assessments amounting to $297.39 levied against the property of said estate on account of the widening of Oak street in the defendant city. In 1912 the city began proceedings under secs. 925—154 to 925—170 of the Statutes of 1911 for the purpose of widening Oak street by condemning and taking a strip of land twenty feet in width from the property adjoining the northeasterly side of said street. None of the property so condemned and taken belonged to the estate of F. Pomainville, deceased. In making the assessment for benefits the city

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assessed benefits against all of the lands of the estate of the deceased lying within 1,000 feet of the land so taken. Plaintiffs appealed from such assessment to the circuit court for Wood county, and the jury found that none of the property of the estate was benefited by the widening of Oak street. From a judgment for plaintiffs canceling the assessment the defendant appealed.

Geo. P. Hambrecht, attorney, and *Geo. L. Williams,* of counsel, for the appellant.

For the respondents there was a brief by *Goggins & Brazeau, W. E. Wheelan,* and *Chas. E. Briere,* and oral argument by *Theo. W. Brazeau.*

VINJE, J. The proceedings for the condemnation of the strip required for the widening of Oak street were had under sec. 925—167, Stats. 1911. Among the provisions therein contained for making the assessment are the following:

"Opposite each description of the land condemned the board shall set down in separate columns the damages sustained by the owner by reason of the taking of the land, the damages, if any, to the adjoining property of the same owner, the total damages, and in cases wherein benefits may be assessed, the benefits which will in their judgment accrue to his lands in the vicinity of the condemned land by reason of the condemnation in question, the excess of damages over benefits, and the excess of benefits over damages, each sum being set opposite the proper description."

Then follow provisions to the effect that no benefits shall be assessed against any lot every part of which is 1,000 feet or more distant from the nearest land condemned, and limitations upon the amount of benefits that can be assessed against lands by reason of any one condemnation proceeding, and upon the amount that can be assessed against lands lying more than 500 feet distant from the nearest land condemned by reason of any one condemnation, and a provision that the board of public works shall proceed as in case of benefits and

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damages on account of public improvements, "giving like notices and opportunities for correction and reporting the assessment to the council in like manner." It is the claim of the city that the word "his" in the phrase "the benefits which will in their judgment accrue to his lands in the vicinity of the condemned land by reason of the condemnation in question," was inadvertently inserted by the revisers of the Statutes of 1898, since it is not contained in ch. 326, Laws of 1889, which was the original enactment of the law, and which is identical with sec. 925—167 except for the insertion of the word "his," referred to; that it must have been inserted by mistake, because they fail to mention the change in their notes to their proposed bill or indicate it by brackets, as was their custom. The statute, it is claimed, should therefore be read as if the word "his" were not there, and as so read it authorized the city to assess benefits against lands represented by the plaintiffs lying within the 1,000-feet zone, even though none of such lands were condemned. The plaintiffs maintain that the statute means the same with the word "his" omitted, and that the revisers by inserting it only made more clear what was already intended, and therefore did not note a mere verbal change which did not affect the meaning. It is not necessary to express any opinion upon the correctness of plaintiffs' claim, for it is evident from the history of the enactment of sec. 925—167 that the section as it now reads stands with the same force and effect as if it were an original act.

In the bill proposed by the revisers to the legislature of 1897 the word "his" occurs. The section was not amended by the legislative committee appointed to examine and suggest amendments to the proposed bill of the revisers. The section as it stands was before the legislature when it was adopted, and we cannot say that any word therein was there by mistake. Ch. 326, Laws of 1889, was specifically repealed by sec. 4978, Stats. 1898, so sec. 925—167 stands as a

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substituted statute. There were good reasons for inserting the word "his" in the statute. The section in which it occurs relates to condemnation of land and deals exclusively with an accounting between the city and the owner of the land condemned growing out of the condemnation. It speaks of damages and of damages and benefits and provides for offsetting the one against the other. It nowhere speaks of benefits alone which cannot be offset by damages. As the statute now reads, it conforms to similar statutes relating to the condemnation of lands for railroads, sec. 1848, Stats. 1913, and to condemnation for highways, sec. 1271, Stats. 1913, where special benefits accruing to the owner of the land condemned may be offset against damages. See *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328. It is not a statute relating to public improvements where benefits may be assessed in the absence of any taking of land or of damages.

It follows that the city was without jurisdiction to assess any benefits against the land in question and that the circuit court properly entered judgment canceling the assessment.

Since there was an entire lack of jurisdiction on the part of the city to make any assessment at all against the lands, its claim that the plaintiffs are estopped to challenge the validity of the assessment because one of them appeared before the board of public works and stated that he made no objection to certain assessments of benefits against his lands, none of which were taken, cannot be maintained. *Jorgenson v. Superior,* 111 Wis. 561, 569, 87 N. W. 565. Moreover, when he appeared before the board of public works he appeared in his individual capacity and not as an executor.

By the Court.—Judgment affirmed.

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WALTER BROTHERS BREWING COMPANY, Appellant, vs. KLUCK, Respondent.

May 4—May 21, 1914.

Principal and agent: Evidence of the relation: Parol evidence affecting writings: New trial.

1. In an action to recover a balance alleged to be due upon account for goods sold and delivered, although the invoices, bills of lading, and some expressions used by the parties in their correspondence were such as might naturally be used in case of sales, yet, there being also in the writings numerous indications that only an agency arrangement existed, and among them a bond given by defendant reciting that he had been appointed plaintiff's agent and was faithfully to perform the duties of such agency, oral testimony to the effect that the true relationship of the parties was that of principal and agent was properly admitted and was sufficient to sustain a verdict for defendant.
2. Newly discovered evidence which is merely impeaching in its character does not ordinarily form a ground for a new trial.

APPEAL from a judgment of the circuit court for Portage county: A. H. REID, Judge. *Affirmed.*

For the appellant there was a brief by *J. Elmer Lehr,* attorney, and *Lehr, Kiefer & Reitman,* of counsel, and oral argument by *J. Elmer Lehr.*

For the respondent the cause was submitted on the brief of *D. I. Sicklesteel.*

WINSLOW, C. J. In this action the plaintiff corporation claimed that the defendant was indebted to it in the sum of $7,636 as a balance due upon an account for beer alleged to have been sold and delivered to the defendant between March, 1894, and August, 1909. The defendant admitted the delivery to him of the beer, but denied that he purchased the same, and alleged that he simply handled it as the agent of the plaintiff.

This issue was tried by the court and jury and determined

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in favor of the defendant. The plaintiff's claim now is that the correspondence of the parties, the form of the invoices, bills of lading, and other writings which passed between the parties establish indisputably the fact that the beer was sold to the defendant rather than delivered to him as agent, and that the court should have admitted no oral testimony tending to show that the real relationship of the parties was that of principal and agent, and should have directed a verdict for the plaintiff. These contentions are untenable. The writings are not conclusive one way or the other. The invoices, bills of lading, and some expressions used in the letters are such as might naturally be used in case of sales, but on the other hand the writings contain numerous indications that only an agency arrangement existed, not the least of which is a bond given by the defendant at the beginning of the transactions in which it was recited that the defendant had been appointed agent of the plaintiff and was to faithfully perform the duties of such agency. The oral testimony to the effect that the true relationship of the parties was that of principal and agent was properly admitted and was amply sufficient to sustain the verdict.

A motion for new trial on alleged newly discovered evidence was properly denied. The proposed evidence was entirely immaterial on the question submitted to the jury and could have no bearing on the case except as tending to impeach one of defendant's witnesses. Newly discovered evidence which is merely impeaching in its character does not ordinarily form a ground for the granting of a new trial. *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377.

By the Court.—Judgment affirmed.

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YAWKEY-CROWLEY LUMBER COMPANY, Respondent, vs. DE LONGE and others, Respondents, and ILLINOIS SURETY COMPANY, Appellant.

May 4—May 21, 1914.

Mechanics' liens: Foreclosure: Parties: Cross-complaint: Bond of contractor: Liability of surety to owner and to subcontractors.

1. In a statutory action by a materialman to foreclose a mechanic's lien, the owner, the principal contractor and his surety, and other lienors are all proper parties.
2. In such an action a cross-complaint by the owner, alleging in effect the giving of a bond by the contractor and surety conditioned for the faithful performance of the contract, the failure of the contractor to furnish the necessary materials and labor to complete the contract, that the owner was thereby compelled to provide the same at his own expense, and that the amount of the contract price remaining in his hands after the breach of the contract by the contractor is insufficient to compensate him for the damages sustained, states a good cause of action against the contractor and surety.
3. To entitle a third person to maintain an action upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but there must be a promise legally enforceable.
4. Subcontractors furnishing labor or materials cannot maintain an action upon a bond given by the principal contractor to the owner, conditioned for the faithful performance of the contract, where neither the contract nor bond contains any express agreement to pay them, but the entire tenor of both instruments shows that the parties intended that the security should be for the benefit of the owner only.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed in part, reversed in part.*

This is an action to foreclose a mechanic's lien on account of materials furnished to the contractor, the *Muskegon Construction & Engineering Company,* and used in the construction of a building for the owner, *O. F. De Longe.* The contractor and the *Illinois Surety Company* entered into a bond

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that the contractor would faithfully comply with all the terms and conditions of the construction contract. The owner and the contractor, on the 1st day of October, 1912, made a contract agreeing that the contractor was to erect a business block and remodel a frame building for the owner. By its terms it was stipulated that if at any time any lien or claim for labor or material furnished the contractor be established against the owner, the owner should have the right to retain out of any payment then due or thereafter becoming due an amount sufficient to completely indemnify him against such lien or claim; and that the contractor, after all payments were made on the contract, should refund to the owner all moneys that the latter might be compelled to pay in discharge of any lien on the premises. It is further alleged that the contractor has failed to pay certain persons who furnished material and labor in the construction of the building; that the amount due the plaintiff and other persons who filed liens exceeds in amount the sums due the contractor; that the said owner will be obliged to pay a very considerable sum in excess of the amount called for by the construction contract; and that the *Surety Company* is obligated to pay the claim and lien of the plaintiff. The complaint demands that the rights of all persons having liens upon the premises be adjusted and adjudged, that the premises be sold to satisfy the judgment, and for a deficiency judgment against the contractor and the *Surety Company*.

The *Surety Company* demurred to the complaint.

The cross-complaint of the owner alleged the making of the construction contract and the giving of a bond for its faithful performance as alleged in the complaint, and copies thereof were attached. It further alleged that the contractor failed and refused to complete its contract and abandoned the work; that the *Surety Company* failed to exercise its option of assuring the performance of said contract, although requested so to do; that the owner took possession of the property and

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furnished the material and labor necessary to complete the contract; that the owner has been damaged by such default, and charges that the *Surety Company* is obligated to pay for the labor and material the contractor omitted to furnish, and protect the premises against liens and all liability arising out of the performance of the contract. It is also alleged that under the provisions of the bond the *Surety Company* became primarily liable to the plaintiff and all other persons who furnished material and performed labor for erecting the building; that the *Surety Company* was given due and timely notice in writing as required by the bond of the default of the contractor within thirty days from the happening thereof, and that the owner duly complied with the provisions of said contract and bond.

It is further alleged that the owner paid upon architects' certificates the sum of $9,258.61 on the contract, of which $3,213.61 was paid directly to materialmen and to laborers contracted for by the contractor; that the owner subsequently paid out from the amount retained the sum of $1,474.70. He claims liquidated damages in the sum of $2,430, and demands judgment that the balance of the unpaid contract price be applied on the costs and expenses incurred by him in completing the contract, and for the sum of $2,299.01, the excess of his claim above the amount he retained of the contract price, together with the costs and disbursements of the action; and that he have judgment against the *Surety Company* for these unpaid claims, when ascertained, and the expenses incurred by him in connection therewith.

The *Surety Company* demurred to this cross-complaint.

The defendants *Schwoegler* and *Kelly* served a cross-complaint charging they furnished labor and material for the building to the amount of $82.40, for which they claim a lien on the premises, and allege substantially the facts set forth in the complaint and cross-complaint concerning the making of the construction contract, the giving of the bond,

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and the contractor's default of payment of their claim, and ask for judgment against him, the *Surety Company,* and the owner.

The *Surety Company* demurred to this cross-complaint.

The trial court overruled the three demurrers, and from this order the defendant *Surety Company* appeals.

For the appellant there was a brief by *Bagley & Reed,* and oral argument by *W. R. Bagley.*

For the respondents there was a brief by *Olin, Butler & Curkeet,* attorneys for the respondent *De Longe,* and oral argument by *W. R. Curkeet.*

SIEBECKER, J. It is contended in behalf of the *Surety Company* that the court erred in overruling the demurrer to the complaint and the two demurrers to the cross-complaints of the defendants, *O. F. De Longe,* the owner of the building, and of *Schwoegler* and *Kelly,* subcontractors.

The default of the principal contractor, as alleged in the cross-complaint of the owner, under the contract made by him with the *Construction Company* for the furnishing of material and the construction of the building embraced in the contract, constitutes a good cause of action against the *Construction Company* for breach of the contract. It is also alleged that the defendant *Surety Company* and the defendant contractor made a bond binding themselves to pay the owner $10,300, conditioned that if the contractor "shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on its part to be kept and performed according to its tenor (except as hereinafter provided), then this obligation to be null and void, otherwise to remain in full force and virtue in law." The demurrer admits the allegation of breach of this construction contract as set forth in the owner's cross-complaint. In effect these allegations show a breach of the contract by the *Construction Company* in failing to furnish the material and labor required to erect the

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building as provided by the contract, and that the owner was compelled to expend money to furnish the material and labor to complete the contract pursuant to the stipulation thereof; that he suffered damages from the *Construction Company's* breach of the contract, and that the amount of the contract price remaining in his hands after the breach of the contract by the contractor is not sufficient to pay his disbursements to complete the contract and to pay him the damages he sustained and stipulated for in the contract, resulting from such breach of the contract. Under these circumstances it is manifest that the owner's cross-complaint states a good cause of action against the contractor and its surety. Since this is an action by the plaintiff to foreclose a mechanic's, laborer's, and materialman's lien provided by statute, the owner, the principal contractor, the *Surety Company,* and other lienors were all proper parties to this action. *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102. We are of the opinion that the allegation of the cross-complaint of the owner as a party to the construction contract states a good cause of action against the defendant, the principal contractor, and the *Surety Company* as its surety.

The question raised by the demurrer of the *Surety Company* to the complaint of the plaintiff, a subcontractor, and to the cross-complaint of the defendants *Schwoegler* and *Kelly* as subcontractors, for furnishing labor and material to the principal contractor, involves claims of a more uncertain nature than those raised by the demurrer to the owner's cross-complaint. The ground of demurrer is that the facts alleged by the subcontractors in their complaints do not constitute a cause of action against the *Surety Company.*

In the case of *United States G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238, it was held that where the principal contractor bound himself to the faithful performance of his agreement for the erection of a certain building and "to pay all claims for labor performed and material furnished," other

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persons furnishing material for such work, which was not paid for by the principal contractor, obtained a right under the contract for their benefit which they could enforce against the surety on the contractor's bond. In the cases of *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102, and *R. Connor Co. v. Ætna Ind. Co.* 136 Wis. 13, 115 N. W. 811, it was likewise held that the provisions of the construction contracts and bonds given to secure faithful performance were intended by the parties to secure payment for the labor and material furnished and conferred the right on the laborers and materialmen to compel payment by the surety. In the latter case the surety relied on the case of *Electric A. Co. v. United States F. & G. Co.* 110 Wis. 434, 85 N. W. 648, as controlling, and that the surety, under the principle of that decision, was not liable to the subcontractor; but the court there pointed out that the acceptance of a bond without a condition for the payment of the claims for material as provided in the principal contract, showed a waiver of such stipulation as regards the surety.

In the *Electric Appliance Case* the court declares that in this jurisdiction the cases do not "sustain the proposition that the third party can maintain an action against an alleged promisor based upon an implied promise to pay;" and further: "We consider the true rule to be that there must not only be an *intent* to secure some benefit to the third party, but there must be a promise, legally enforceable. The contract and bond in this case fail to meet these requirements. The situation presented shows a want of any intent to secure a benefit to third parties." We refer to this case at length to show that the subsequent cases on the same subject in this court, cited above, are in accord and harmony with this case, it being therein determined that the contracts and bonds of the parties showed an intent to secure such benefit to the third parties, and that a legally enforceable promise existed. The *Electric Appliance Case* was referred to in *Lenz v. C. & N.*

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W. R. Co. 111 Wis. 198, 204, 86 N. W. 607, decided soon thereafter, and it was there declared that "The insufficiency of the bond under consideration in that case was that it did not require or promise any payment to the materialmen seeking to enforce it, merely protection to the obligee party; hence, of course, there was no apparent intent to benefit the materialmen."

Applying the rule thus established by the adjudications in this jurisdiction to the instant case the question is: Does the contract of the principal contractor and the owner and the bond given for its faithful performance show that it was intended that subcontractors furnishing labor or material for the erection of this building to the principal contractor should have the benefit of the bond given to secure faithful performance of the construction contract and promise payment to them? A consideration of the provisions of the contract and bond leads us to the conclusion that it was intended that the bond should be a protection only to the obligee party, *O. F. De Longe.* The contract and bond are a part of the complaint. It appears that the contractor was to provide all the materials and perform all the work required to erect and remodel the portions of the buildings embraced in the plans and specifications, made a part of the contract. It was provided that, in case of discontinuance of the contract for any of the grounds specified, no further payment should be due the contractor until the buildings were completed, and that the owner should be liable to the contractor for any balance remaining due him in excess of the expenses incurred by the owner in finishing the work, and that "such excess shall be paid by the owner to the contractor;" and that such balance or excess of expense shall be adjusted by the architect between the contractor and the owner. It is also stipulated that the owner shall have the right to deduct from any amount due the contractor his damages, and it is expressly agreed that if there shall be any lien or claim for which the owner is legally liable and which arises from obligation of the contractor, the

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owner is to retain out of any amount due the contractor a sum sufficient to indemnify himself against such lien or claim. The bond expressly stipulates that the surety shall be subrogated to its principal's rights in case of any default and to all claims it may have against the owner and to any amount due its principal from the owner under the contract. The tenor of all the agreements in the contract and bond shows that the parties intended the security should be for the benefit of the owner only, and that laborers and materialmen were not to be benefited thereby, nor was there a promise of payment of their demands. Under these conditions of the contract and bond the security is only protection to the obligee named therein; and subcontractors and laborers of the contractor obtained no right which they can enforce against the surety, and hence they have no cause of action against the surety upon their complaints, and the demurrers of the *Surety Company* to the complaints of these subcontractors and laborers must be sustained.

By the Court.—The order overruling the demurrer to the cross-complaint of *O. F. De Longe* is affirmed, and is reversed as to the demurrers to the plaintiff's complaint and the cross-complaint of the defendants *Schwoegler* and *Kelly,* and it is ordered that the demurrers to the complaint and cross-complaint of the subcontractors be sustained.

CITY OF BARABOO, Respondent, vs. STONE, Appellant.

May 4—May 21, 1914.

Municipal corporations: Baraboo city charter: Appeal from police justice: Affidavit of good faith.

Under sec. 10, ch. VII, of the Baraboo city charter (Laws of 1882, ch. 21), upon appeal by the defendant from a judgment of the police justice of that city, an affidavit of good faith is not necessary.

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APPEAL from an order of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Reversed.*

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

V. H. Cady, for the respondent.

KERWIN, J. The defendant was arrested on a warrant issued by a police justice of the city of *Baraboo,* Wisconsin, charging her with disorderly conduct upon the streets and in public places of said city, contrary to the provisions of the city charter of said city. Upon hearing before the justice the defendant was found guilty and fined $5 and costs of prosecution, and in default of the immediate payment of such fine and costs was ordered imprisoned in the common jail of Sauk county for ten days and until such fine and costs be paid.

The defendant served notice of appeal from the judgment and conviction and also gave a proper undertaking, but failed to make and file an affidavit to the effect that the appeal was taken in good faith and not for the purpose of delay. The circuit court on motion dismissed the appeal for failure to file said affidavit, holding that such affidavit was necessary to perfect the appeal.

The only question here is whether the appeal was properly taken. Sec. 1 of ch. VII of the charter of the city of *Baraboo* (Laws of 1882, ch. 21) provides that all actions brought to recover any penalty or forfeiture under the act, or any ordinances, by-laws, or regulations made in pursuance thereof, shall be brought in the corporate name of the city. Sec. 2 provides that the first process shall be a summons, unless oath be made for a warrant as in criminal cases before justices of the peace. Sec. 6 provides that in cases where oath is made for a warrant the complaint shall be made on oath of the complainant, and provides substantially what the complaint shall contain, and that upon filing such com-

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plaint the police justice shall issue a warrant, and provides the form of the warrant; and further provides the proceedings upon the return of such warrant; and secs. 8 and 9 provide for the trial, proceedings, rendition of judgment, and commitment in cases where action is commenced by warrant. Sec. 10 provides in substance that the defendant may appeal from the judgment to the circuit court for Sauk county, provided that such defendant, within twenty-four hours, pays the justice his costs and $1 for his return, and enters into a recognizance with one or more sufficient sureties to be approved by the justice, conditioned to appear before said court and abide the judgment of the court therein, and that the justice from whose judgment an appeal shall be taken shall make a special return of the proceedings had before him and forthwith cause the summons or warrant and return, together with the proceedings and a copy of the entries in his docket, together with the recognizance, to be filed in the office of the clerk of said court; and further provides that the city may appeal from any such judgment as in other cases before justices of the peace.

This section of the charter seems to provide for an appeal by the defendant and the steps necessary to be taken to perfect the appeal, and does not require an affidavit of good faith. It is quite apparent that the recognizance provided for under this section was calculated to obviate the necessity of an affidavit of good faith, and that under the provisions of the charter no affidavit of good faith is necessary on the defendant's appeal. It follows that the court below was in error in dismissing the appeal.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

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SWEET, Executrix, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 4—May 21, 1914.

Railroads: Negligence in "poling" car: Death of switchman: Contributory negligence: Evidence: Questions for jury: Assumption of risk: Federal Employer's Liability Act: Procedure in state courts: Damages: Instructions to jury: Harmless errors.

1. In an action against a railway company for the death of a switchman, which occurred in the operation of "poling" a freight car, the evidence is *held* sufficient to sustain a finding of negligence on the part of the foreman in not directing the operation to be performed in the usual and ordinary way by stopping the engine as soon as the pole or timber was firmly braced between the engine and the car to be moved, so as to permit the man holding it to get out of the way, and by omitting to signal the engineer to stop when the timber was so braced.
2. The fact that a subordinate employee did not give directions to his foreman as to the manner of performing a switching operation in which both were engaged, cannot be regarded as affirmative proof of contributory negligence.
3. The deceased cannot in this case be held to have been guilty of contributory negligence as a matter of law, either because he rode upon the engine instead of taking a position upon the ground while holding the timber with which the operation was to be performed, or because he selected for the purpose a timber which was only thirty-four inches in length.
4. Under the federal Employer's Liability Act, an employee does not assume the risk of a fellow-servant's negligence.
5. In an action under the federal Employer's Liability Act to recover for the death of an employee, for the benefit of the widow and a dependent child, there was no error in instructing the jury that in fixing the amount of the damages they should include the value of the "support and protection" such widow and child would have received during the time the deceased would probably have lived,—the word "protection" being evidently used in the sense of pecuniary protection from want or penury.
6. In fixing the amount of damages for the death of an employee, under said act, the jury may take into consideration the ordinary probabilities in respect to future pecuniary benefits and

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support which apply generally in human relations, including reasonable expectation of benefits from gifts or inheritance.

7. Where an act of Congress commits to the state courts the duty of trying cases arising thereunder, such cases may be tried according to the state rules of procedure.

8. Where a railway employee, fifty-two years of age, sober and industrious, who had accumulated only a homestead valued at $2,000, had customarily contributed from $90 to $100 a month to the support of his wife, aged forty-nine, and a dependent daughter aged twenty-two, an award of $4,000 to the widow and $1,000 to the dependent child was less than the real value of the support and maintenance of which they were deprived, so that the jury could not be presumed to have allowed anything on account of prospective gifts or inheritance, even if (because of there being no basis in the testimony to justify it) it was error to instruct them that they might consider prospective benefits of that nature.

APPEAL from a judgment of the circuit court for Sauk county: CHESTER A. FOWLER, Judge. *Affirmed.*

Edward M. Smart, for the appellant.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

TIMLIN, J. This is an action under the federal Employer's Liability Act of Congress. James Sweet, an employee of the defendant interstate common carrier, while engaged in switching cars in its yard at Baraboo, Wisconsin, on February 16, 1912, was killed, it is charged, by negligence of defendant. The plaintiff is his widow and executrix. The case was submitted to a jury, which found that the foreman of the switching crew and the engineer in charge of the switch engine failed to exercise ordinary care, which failure was the proximate cause of Sweet's death; also that there was no contributory negligence on the part of Sweet, and awarded as compensation to his widow $4,000, and as compensation to his feeble-minded child, over twenty-one years of age but a member of his family and dependent upon him for support, the sum of $1,000. The appellant complains there was no

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evidence of any negligence on the part of the defendant, that there was affirmative and undisputed evidence of contributory negligence, and that the trial court erred in instructing the jury on the measure of damages.

Omitting for brevity's sake introductory and explanatory matters, we may begin with the statement that the switching crew present at the time in question consisted of the foreman, Moran, the engineer, Pitts, the fireman, Gayman, and the subordinate switchman, James Sweet. In carrying on their switching operations it became necessary or convenient to push by hand northerly onto the lead track a certain empty refrigerator car standing on a somewhat parallel track connected by switch with this lead track, upon which stood the switch engine and tender, back toward the switch and a short distance south of the switch. Pushing by hand, they got the refrigerator car so that the front part of it was on the lead track and the rear trucks on the frog of the switch, where it stuck and they could move it no further by hand. The foreman, Moran, then directed that they pole the refrigerator car. Poling is an operation sometimes used in switching by which the switch engine is employed to push a car for a short distance, which car is standing upon another somewhat parallel and connecting track. A pole or piece of timber is held with one end against the car to be pushed and the other end pointing toward the engine, which, upon signal, creeps slowly up and presses against the end of this pole or timber, then stops, holding the timber in place. Or the pole or timber may be held with one end against the front or rear of the engine, as the case may be, and the other end pointing in the direction of the car to be pushed, while the engine creeps slowly up until the pole or timber engages the car to be pushed. So far there is no substantial conflict in the evidence, and there is no doubt that the man holding the pole or timber is in a very dangerous position. There was evidence on the part of the plaintiff tending to show that the usual and customary way of

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poling was to stop the engine on signal as soon as the pole or timber had been firmly braced between the engine and the car to be moved, in order to permit the man holding the pole to then step aside, after which the engine was started up smartly, giving the car to be moved a sudden push, thus starting it forward, when, of course, the pole or timber dropped to the ground. On the part of the defendant there was evidence tending to show that the usual and customary mode, when the man holding the stick held it against the engine, did not include a stop after the pole was braced, but was to keep on in steady motion toward the car to be moved—push it along, the assistant to continue holding the pole or timber in place. It will be observed that this is still more dangerous than the mode first described. There was evidence upon which the jury might decide that the mode first described was the usual and customary mode of performing this poling operation, and we will consider that point settled by the verdict in plaintiff's favor and proceed to detail what happened in the instant case. It is one of the known operations of switching. Webster, Internat. Dict. "Poling."

It is well known that switch engines stop and start only upon signal from the foreman of the switching crew. When the foreman suggested poling this car, Sweet went to get a pole or stick and Moran signaled the engineer and had him back the engine up so that the tender was from four to six feet behind the south end of the refrigerator car but on the lead track. Sweet came back with a piece of oak plank or timber thirty-four inches long and about four by eight inches, weighing about twenty-eight pounds, and stepped on the rear step of the tender on the fireman's side, holding one end of this timber against the rear of the tender and the other end pointing in the direction of the nearest part of the near end of the refrigerator car. He then said, "All right." Moran was then standing on the engineer's side of the track opposite the opening between the engine and the refrigerator car and

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facing Sweet, and the latter was in the position heretofore stated, facing Moran. Moran gave a slow back-up signal to the engineer, who was leaning out of his cab looking back, and the engine moved back slowly until the pole or timber held by Sweet engaged the near end of the refrigerator car. Moran then gave no stop signal, and the engine did not stop but pushed the car about the length of the stick, when suddenly the pole or timber slipped or dropped and the engine crushed Sweet between the tender and the rear of the refrigerator car. When Moran saw that the pole or timber had slipped and the engine and car were coming together he gave a sudden stop signal. The engine stopped promptly, but the car moved on three or four feet from the impetus it had already received. Sweet stepped out on Moran's side, fell down, stated he was "done," and died. The refrigerator car moved altogether from eight to ten feet.

We think it is apparent from the foregoing that there is ample evidence to warrant the jury in finding that Moran was negligent in not directing this poling operation to be performed in the usual and ordinary way and in omitting to signal the engineer to stop as soon as the pole or stick engaged the end of the refrigerator car so as to be firmly braced between that and the tender and the necessity of holding it avoided, and so enable Sweet to leave the step of the tender while the engine gave the necessary push on the stick against the refrigerator car. Whether there is also evidence sufficient to establish the negligence of the engineer is immaterial. Indeed, upon the theory of the defendant and its explanation of the usual and customary mode of performing this poling operation we would be inclined to agree with the learned circuit judge that this usual mode or practice is in itself very negligent. The engineer, Pitts, testified that he did not know much about the poling operation and that he could not say positively whether he remembered poling a car before,

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and that he did not know they were going to pole the car in question because nobody told him so, and further:

"In performing a poling operation it is usual for the engineer, when the man is in between holding the stick, to watch the rear end of the car that is being poled, and I certainly did in this case, to see how close I was going to the car, to see when the car was moving. I was not going to couple onto it, but I was going to shove it out over that switch. I don't know exactly how they were doing it. I was working according to signals. The man that was giving me the signals was standing out south of the lead track, and I was watching the end of the box car part of the time, and most of the time I was looking at the man that was giving me the signals. We were moving very slow."

It is argued that in the exercise of ordinary care Sweet should have taken this stick, placed one end of it against the car, and stood on the ground holding it, and have the foreman direct the engine slowly back to the stick until it set. Then Sweet could have stepped to one side. We cannot think it affirmative proof of contributory negligence on the part of the injured employee that he did not direct the foreman to direct the backing of the engine slowly to the stick until it set. It is not usual for the subordinate to give directions to his superior. Equally unsatisfactory is the argument that, because he did not select the more dangerous position of standing on the ground between the approaching engine and the car to be moved, he was negligent. It is argued that he should have selected a longer pole or stick, but it does not appear that any other was available, and by creeping up slowly until the thirty-four inch oak timber was firmly braced between the engine and the car and then stopping the engine and permitting Sweet to step aside, would have made this firm, solid piece of oak quite appropriate for the purpose for which it was selected. The evidence on this point was left so that the jury could properly find that Sweet expected that this poling should

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be done in the usual and ordinary way as first above described. It must be quite apparent to persons of ordinary and intelligent observation that a stick of this kind, not fastened at either end, could not be used for any purpose of pushing steadily, but is available only for a single push or thrust. It is apparent that as soon as the car was by the first impact released from whatever obstacle stopped or held it, or as soon as it encountered a slight down grade on the rail or passed over any obstacle which retarded its movement, the distance between the engine and the car so pushed would be increased, and an increase of half an inch or less in that distance would cause the stick to drop down and the engine and car collide, unless the engine were immediately stopped or the car should assume such rate of movement that the pursuing engine would not overtake it.

We conclude there was evidence of negligence on the part of the foreman, Moran, sufficient to support the verdict in failing to give a stop signal. Diligence must be commensurate with the danger of the situation. The question of assumption of risk was not requested to be submitted to the jury, and under our statute, sec. 2858*m*, it is therefore found by the judgment in favor of the plaintiff. The plaintiff did not assume the risk of negligent action of a fellow-servant. To hold the contrary would be to annul sec. 1 of the act of Congress in question. *Northern Pac. R. Co. v. Maerkl,* 198 Fed. 1. The question of plaintiff's contributory negligence was fairly for the jury.

Error is assigned because the jury was instructed as follows:

"In fixing these sums you will be reasonable and just and fix such sums as will in your honest and deliberate judgment recompense or compensate the wife and children for such pecuniary or money loss as they actually sustained in consequence of the death of the husband and father. It is merely a matter of pecuniary loss, however. You cannot allow anything whatever for the grief or anguish of the wife or chil-

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dren by reason of the death. You will consider the age of the deceased and that of his wife and children, and the condition of the health of the deceased, his earning capacity, and his reasonable prospects at the time of his death. You should include the value of the support and protection by the deceased of the wife and dependent child or children, if any, that they would have received during the time that he probably would have lived. You should also consider the accumulation of property that the earnings of the deceased would probably have made had he continued to live, if you find that, and the reasonable expectation that the wife and children had of pecuniary advantage by ultimately receiving such accumulations, if such you find. The limit of the total compensation to both wife and children is such sum as, being put at interest, will each year, by taking a part of the principal and adding it to the interest, yield an amount sufficient for such support of the wife and the dependent child or children during the time the deceased would probably have lived as he would have furnished had he lived, together with such other sum as the evidence shows there is a reasonable expectation the wife and children would have received from his earnings. . . . By request of Mr. Thomas I will say that they make no claim for compensation for any child except the youngest, I have forgotten the age, but the one whom it is claimed is in part incompetent.

"Mr. Smart: Then I understand that that part of the judge's instructions relating to that is to be eliminated—it is modified to that extent.

"Court: Yes, wherever I have used the word 'child' or 'children' it will be understood as referring only to this child just mentioned.

"Mr. Thomas: We claim damages for the widow and that child."

It is argued that the use of the word "protection" in this connection was erroneous. The seventh question of the special verdict merely required the jury to find what sum would compensate the widow for the pecuniary loss sustained as a result of Sweet's death; and the eighth question was couched in similar language and referred to the children, which was explained in the charge as referring only to the feeble-minded,

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dependent child. Taking the charge as a whole, it is apparent that the court meant in using the word "protection," and must have been understood to mean, pecuniary protection from want or penury. The word was used in this sense in *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264.

Quoting from *Baltimore & P. R. Co. v. Mackey,* 157 U. S. 72, 86, 15 Sup. Ct. 491:

"In *Rogers v. The Marshal,* 1 Wall. 644, 654, Mr. Justice DAVIS, speaking for the court, well observed that 'a nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury.' And in *Evanston v. Gunn,* 99 U. S. 666, 668, Mr. Justice STRONG said: 'Sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications are given in the context, and the jury could not possibly have been misled.' And so in *Tweed's Case,* 16 Wall. 504, 516: 'Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained.' See, also, *The Sybil,* 4 Wheat. 98."

There was evidence that the deceased was aged about fifty-two at his death. His widow was about forty-nine. They had four children. The youngest, living with her parents, was twenty-two years of age, was feeble-minded, unable to earn her own living, and must be provided for and supported during her life. Deceased owned a homestead worth about $2,000 which he had accumulated since his marriage. He was sober, industrious, and in good health, earned about $100 per month, and turned his pay check over to his wife every month. He had not saved anything except this homestead and monthly premiums on a life insurance policy for $2,000. His expectancy of life according to American Experience Tables of Mortality was 19.49 years, and that of his wife and dependent child greater. It is not quite clear whether the reasonable expectation of pecuniary advantage by ultimately receiving such accumulations mentioned in the instruction re-

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lates to expectation of gifts or the expectation of an inheritance by operation of law, or both. The accumulation of property made by the deceased up to the time of his death was small and his earning capacity was not apt to increase. What he had saved, however, was saved during the time when he had a family of four children to maintain, three of whom had become self-supporting. There is evidence of industry, sobriety, and good habits, but no particular indications of thrift or of a saving disposition. In the fact that he turned his pay check over to his wife every month there is ground for an expectancy of a continuation of such gifts. Part of this instruction is taken almost literally from the last sentence in the opinion in *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292, 77 N. W. 169, and the rule for this state may also be found stated in *Castello v. Landwehr,* 28 Wis. 522; *Kaspari v. Marsh,* 74 Wis. 562, 43 N. W. 368; *Lawson v. C., St. P., M. & O. R. Co.* 64 Wis. 447, 24 N. W. 618; and other cases.

The federal Employer's Liability Act gives a right of action to the personal representative of the persons there described for death caused in whole or in part by the negligence of other agents or servants of employers of the class there mentioned. This is declared to be for the benefit of the surviving widow or husband and children of such injured employee, and if none, then for the benefit of such employee's parents, and if neither widow, husband, children, or parents, then for the benefit of the next of kin dependent upon such employee. Unlike our statute, sec. 4256, this contains no directions as to the measure of damages. Neither did the prototype of all those statutes known as Lord Campbell's Act. Speaking of the Illinois statute similar to ours in *Richmond & D. R. Co. v. Elliott,* 149 U. S. 266, 13 Sup. Ct. 837, the supreme court said:

"Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give

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weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties."

This, we take it, means that ordinary probabilities which affect every person may be considered by the jury. In *Vicksburg & M. R. Co. v. Putnam,* 118 U. S. 545, 7 Sup. Ct. 1, a judgment was reversed because the trial court by instructions attempted to fix, by the aid of standard life and annuity tables, the exact measure of the loss of future income by the beneficiary. In *Railroad Co. v. Barron,* 5 Wall. (72 U. S.) 90, the trial court instructed the jury as follows:

"In this case the next of kin are the parties who were interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them."

The supreme court said:

"The statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law. . . . If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin; in case of his death by the injury, the equivalent is given by a suit in the name of his representative. There is difficulty in either case [by the injured party in case he survives, or by his administrator in case of death] in getting at the pecuniary loss with precision or accuracy, more difficulty in the latter than in the former, but differing only in degree, and in both cases the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury."

Tiffany on Death by Wrongful Act (2d ed.) sec. 159 *et seq.,* distinguishes at least by classification between loss of prospective gifts and that of a prospective inheritance. The weight of authority seems to be that from evidence of age, health, family relations, amount of earnings, thrift and industry, prior accumulations, and disposition toward the beneficiaries, the requisite probability of reasonable expectation

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of benefits from gifts or inheritance may be supported. The evidence here is slight on this subject, still there is some evidence to which the instruction may relate. However we have in this state a statute of procedure which forbids the reversal of judgments by this court on the ground of misdirection of the jury or the improper admission of evidence, unless in the opinion of the court, after an examination of the entire action or proceeding, it shall appear that the error complained of affected the substantial rights of the party seeking to reverse or set aside the judgment or to secure a new trial. Sec. 3072*m*, Stats. 1913. Where an act of Congress commits to the state court the duty of trying cases arising thereunder, such cases may be tried according to the state rules of procedure. Considering the chance of life of the deceased and that of his widow and dependent child and the amount contributed for support, we think it is apparent that the jury allowed nothing for probable gifts or inheritance. If the deceased was contributing from $90 to $100 a month to the support of his family, including the dependent child, it is manifest that $5,000 would not continue this rate of contribution for anything like the period of his expectancy of life. The award of $4,000 to the widow and $1,000 to the dependent child is so small as to be less than the real value of their support and maintenance. It is scarcely equal to the value of such support and maintenance for five or six years at the rate at which the deceased had been accustomed to contribute thereto. So much they lost by his death, allowing him only five years instead of nineteen years expectancy of life. Therefore, while concluding there is some slight basis in the testimony to justify the instructions above quoted, we must at the same time hold that if there is no such sufficient basis in the testimony, nevertheless the quoted instructions did not in this case, as it appears to us, affect the substantial rights of the defendant.

By the Court.—Judgment affirmed.

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GREEN BAY & MISSISSIPPI CANAL COMPANY, Respondent, vs. KAUKAUNA GAS, ELECTRIC LIGHT & POWER COMPANY, Appellant, and another, Respondent.

SAME, Appellant, vs. SAME, Respondents.

May 4—May 21, 1914.

Public utilities: Acquirement by city: Liens: Assumption: Liability for unpaid rent: Landlord and tenant: Renewal term: Fixing rental: Arbitration: Accord and satisfaction: Interest on rental not paid when due.

1. A municipality in which is a public utility operating under an indeterminate permit does not, in acquiring the property of such utility pursuant to secs. 1797*m*—80 *et seq.*, Stats. 1911, render itself liable for unpaid rent on a lease owned by such utility and acquired in the proceedings.
2. The statute limits the municipality strictly to the acquisition of the property of the public utility, and while this would permit the assumption of valid liens thereon up to the amount of compensation fixed by the railroad commission, other existing obligations must be liquidated by the public utility.
3. A lease of water for power at a rental of $6 per horse power per annum provided for a renewal for a second term of ten years at a rental to be fixed by arbitration. At the end of the original term no arbitrators were appointed, but the lessee continued for about three years to use the water and pay rent at the old rate, the lessor giving receipts in full for part of the time, and afterward receipts "on account." Arbitrators were then by agreement appointed "to determine the annual rental which [the lessee] ought in justice to, and shall, pay to [the lessor] for said premises and power, during said renewal period," specifying the entire ten-year term; and in making the next payment, prior to the award, the lessee stated that it was made subject to the terms of the arbitration agreement and that if the decision should establish a lower rental the lessor would be charged with the excess paid during the period covered by said agreement. *Held*, that these facts sustained a finding of the court that there was no accord and satisfaction as to the rent accruing prior to the arbitration agreement.
4. In making their own independent investigation in this case the arbitrators were not guilty of misbehavior, but did only what the parties consented they might do.

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5. The lease provided in terms that the rent or any part thereof not paid when due should bear interest from the time it became due. The arbitrators found that the lessor was entitled to receive as rent during the renewal period $10 per horse power per annum, payable quarterly in advance according to the terms of the lease. It appearing that both parties were to blame for the delay in having the rental fixed and had proceeded upon the assumption that there would be an equitable accounting and adjustment when it should be fixed, it is *held* that the lessor was entitled to interest on the unpaid difference in the rent from the dates when it should have been paid had the rental been fixed at the commencement of the renewal period. KRAWIN, J., dissents.

APPEALS from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Modified and affirmed.*

On the 1st day of October, 1901, the plaintiff leased to the Kaukauna Electric Light Company water equal to 100 horse power until October 1, 1907, at an annual rental of $600, payable quarterly in advance on the first days of January, April, July, and October in each year, with a provision that if rent was not paid when due it should bear interest at six per cent. from that time till paid. The lease gave the lessor a first lien upon all buildings then or theretofore erected upon certain lands where the lessee was to use the water. It also provided for an option on the part of the lessee to renew the lease for eighty years from and after the 1st day of October, 1907, "in terms of ten years each, the rent for each succeeding ten years, if the parties are unable to agree, to be fixed by arbitration, each party selecting one competent, disinterested, and impartial arbitrator, and if they are unable to agree, those two selecting a third like arbitrator, the written decision of which three arbitrators, or any two of them, shall be binding upon the parties as to the amount of rental to be paid by the lessee to the lessor during the ensuing term of ten years." Subsequently the Kaukauna Electric Light Company, with the consent of the lessor, assigned the lease to

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the defendant *Kaukauna Gas, Electric Light & Power Company,* hereinafter called the *Kaukauna Company.* The latter exercised its option to renew the lease for ten years from October 1, 1907, but the parties failed to agree upon the rental and failed to appoint arbitrators. In 1911 the city of *Kaukauna* began proceedings to acquire the property of the *Kaukauna Company* under the provisions of sec. 1797*m*—80, Stats., and on or about January 1, 1912, took over its property. In the meantime the *Kaukauna Company* paid the plaintiff $600 per annum in quarterly payments as rental. In 1910 the parties entered into an arbitration agreement, each selecting an arbitrator, the two so selected, if unable to agree, to select a third, which they did, submitting to them "to determine, as arbitrators between said parties, the annual rent which the *Kaukauna Gas, Electric Light & Power Company* ought in justice to, and shall, pay to the *Green Bay & Mississippi Canal Company* as rent for said premises and power during said renewal period, to wit, from the 1st day of October, 1907, to the 1st day of October, 1917." The arbitrators did not meet till February, 1912, and the city of *Kaukauna* was also represented in the arbitration proceedings. The arbitrators found that plaintiff was entitled to receive as rent during the renewal period the sum of $10 per horse power per annum, payable quarterly in advance according to the terms of the lease. Plaintiff brought an action to recover from the *Kaukauna Company* the difference between $6 per annum per horse power and $10 per annum per horse power from October 1, 1907, to January 1, 1912, with interest at six per cent. from the date when payment should have been made, and to foreclose its lien on the buildings located upon the lands mentioned. The court entered judgment in favor of plaintiff for the amount of principal due and interest from date of award, but not for interest from time quarterly payments were due, directed that execution issue against the defendant *Kaukauna Company,* and

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in case it is returned unsatisfied that the buildings be sold to satisfy the lien. The defendant *Kaukauna Company* appealed from the judgment entered against it, and the plaintiff appealed because interest was not allowed from the time quarterly payments became due.

For the defendant *Kaukauna Gas, Electric Light & Power Company* as appellant there were briefs by *Nath. Pereles & Sons,* attorneys, and *Daniel W. Sullivan,* of counsel, and oral argument by *Mr. Sullivan.* They contended, *inter alia,* that the city had been substituted as lessee before the rent in question accrued, the award not having been made until after the assignment; that an assignee is liable for all rent accruing or payable during his tenancy; and that there can be no apportionment of such rent; citing, among other authorities, *Commercial H. Co. v. Brill,* 123 Wis. 638, 101 N. W. 1101; 18 Am. & Eng. Ency. of Law (2d ed.) 278, 361; 24 Cyc. 1169, 1176, 1177, 1180, 1370, 1371; 3 Elliott, Contracts, § 1867; *Bowen v. Haskell,* 53 Minn. 480, 55 N. W. 629; *West Concord M. Co. v. Hosmer,* 129 Wis. 8, 107 N. W. 12; Jones, Landl. & T. §§ 661, 667; *M'Creesh v. M'Geough,* 7 Irish Rep. (Com. Law) 236; *Sherman v. Cobb,* 16 R. I. 82, 12 Atl. 232; *Hegan M. Co. v. Cook's Adm'r,* 22 Ky. L. Rep. 427, 57 S. W. 929; 1 Tiffany, Landl. & T. §§ 176, 181; *Anderson v. Robbins,* 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; *Marshall v. Moseley,* 21 N. Y. 280; *Donahoe v. Rich,* 2 Ind. App. 540, 28 N. E. 1001; *Logan v. Anderson,* 2 Doug. 101; *Smith v. Niver,* 2 Barb. 180; *Boyd v. Gore,* 143 Wis. 531, 128 N. W. 68; *Kneeland v. Schmidt,* 78 Wis. 345, 47 N. W. 438; *Martineau v. Steele,* 14 Wis. 295; *New York v. Ketchum,* 67 How. Pr. 161; *Martin v. Martin,* 7 Md. 368; *Trask v. Graham,* 47 Minn. 571, 50 N. W. 917; *Graves v. Porter,* 11 Barb. 592.

For said defendant company as respondent there was a brief by *Nath. Pereles & Sons,* attorneys, and *Alex. L. Strouse,* of counsel, and oral argument by *Mr. Strouse.*

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They argued that until the award the amount of rent due was unliquidated and could not have been approximately ascertained by the party chargeable with its payment, hence interest was not recoverable. *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *J. I. Case P. Works v. Niles & S. Co.* 107 Wis. 9, 82 N. W. 568; *Remington v. E. R. Co.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321; *Ehrlich v. Brucker,* 121 Wis. 495, 99 N. W. 213; *Lowe v. Ring,* 123 Wis. 370, 101 N. W. 698; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *People ex rel. Cranford Co. v. Willcox,* 207 N. Y. 743, 101 N. E. 174; *Burke v. Sidra Bay Co.* 116 Wis. 137, 92 N. W. 568.

For the plaintiff as appellant and respondent there were briefs by *Hooper & Hooper,* and oral argument by *Moses Hooper.* They argued, among other things, that the assignment of a lease by the lessee and the taking of rent from the assignee by the lessor does not release the lessee unless the lessor accepts the assignee and releases the lessee. *Bailey v. Wells,* 8 Wis. 141, 157, 158; *Lovejoy v. McCarty,* 94 Wis. 341, 344, 68 N. W. 1003; *Martineau v. Steele,* 14 Wis. 295; *Wineman v. Phillips,* 93 Mich. 223, 228, 231, 53 N. W. 168; *Rees v. Lowy,* 57 Minn. 381, 383, 384, 59 N. W. 310. It was error to disallow interest from the dates when quarterly payments had been earned. *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *West v. M., L. S. & W. R. Co.* 56 Wis. 318, 323, 324, 14 N. W. 292; *Crescent M. Co. v. Wasatch M. Co.* 151 U. S. 317, 14 Sup. Ct. 348; *Forrer v. Coffman,* 23 Grat. 871.

VINJE, J. Several questions arise upon the appeal of the defendant *Kaukauna Company,* the main one being whether it or the city of *Kaukauna* is liable to plaintiff for the unpaid rental of $4 per annum per horse power from October 1, 1907, to January 1, 1912, being the difference between $6, the amount paid during this time by the defendant *Kau-*

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kauna Company, and $10, the amount found to be due by the arbitrators. The *Kaukauna Company* contends that since the city had succeeded to its rights and had taken over its property at the time the arbitrators made their award, and had become the lessee of the lease, it became liable to plaintiff for the amount of the award; that liability did not accrue till the award was made August 14, 1912. It further contends that no liability exists against it because at the time the rent accrued it was not a party to the lease and it could not be enforced against it. A long argument with numerous citations of authorities is made on the liability of substituted lessees and as to the effect of assignment of leases upon the right of the lessor to recover against the assignee. In the view of the court this argument and these authorities do not reach the question here presented, which is substantially this: Does a municipality, in acquiring a public utility subject to the provisions of secs. 1797*m*—80 *et seq.*, Stats. 1911, render itself liable for unpaid rent on a lease owned by the utility and acquired in the proceedings? When the defendant *Kaukauna Company* received an indeterminate permit it thereby agreed that the city of *Kaukauna* might acquire its property subject to the provisions of the Public Utility Law. That law, however, authorizes the municipality to acquire nothing but the *property* of the public utility. It does not authorize it to acquire the corporation itself or its obligations or to incur any indebtedness on account of any liability of the corporation. The statute limits the municipality strictly to the acquisition of the property of the public utility, and such was the scheme consented to by the *Kaukauna Company* when it received its indeterminate permit. It cannot now be heard to say that in acquiring such property the city also assumed an obligation to pay for rental of power used by it long before the city took over its plant. In acquiring such property the municipality must take it subject to any valid liens thereon up to the amount of compensation fixed by the railroad

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commission; but it does not assume a liability for any indebtedness arising out of the use of power furnished the public utility before it acquires the plant. Such indebtedness must be liquidated by the public utility.

From October 1, 1907, to January 1, 1910, receipts in full were given by the plaintiff when quarterly payments were made. Afterwards receipts "on account" were given. The trial court found there had been no accord and satisfaction and that the intent of both parties was that the payments of $6 per annum per horse power were on account, and if a larger sum was fixed by the arbitrators the *Kaukauna Company* would pay the additional amount, and if a smaller sum the plaintiff would refund the difference. There is abundant testimony to support this finding. The arbitration agreement dated November 14, 1910, was "to determine . . . the annual rent which the *Kaukauna Gas, Electric Light & Power Company* ought in justice to, and shall, pay to the *Green Bay & Mississippi Canal Company* as rent for said premises and power during said renewal period, to wit, from the 1st day of October, 1907, to the 1st day of October, 1917." December 11, 1911, the president of the *Kaukauna Company* wrote the plaintiff:

"The rental payment by our company of $124 each month is made to you under the terms of the arbitration agreement. If the arbitrators' decision will be for a larger rental than $6 per horse power per annum, our company will be charged with the additional amount, and if the decision will establish a lower rental, your company will be charged with the excess *paid during* the period covered in the arbitration agreement."

There is additional evidence in support of the court's finding, but that here set out establishes beyond question that the parties did not regard the payments made as an accord and satisfaction.

We have carefully examined the evidence as to the alleged

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misbehavior of the arbitrators, and from such examination we are satisfied the court properly found that there was none. In making their independent investigation the arbitrators did nothing more than the parties consented they might do.

Upon the plaintiff's appeal the question of whether it is entitled to interest upon the amount unpaid only from the time of the award, as the court adjudged, or from the time the quarterly payments should have been paid, is raised. The court found that plaintiff was not entitled to any interest on any of the instalments of rent till after the award of the arbitrators was made and forwarded to the parties. The lease provides, both as to the first period up to October 1, 1907, and for renewal periods, that the rent should become due and payable quarterly in advance, and that "in case said rent, or any part thereof, shall not be paid as and when the same become due and payable, the same shall bear and draw interest from the time it becomes due, till paid, at the rate of six per cent. per annum." This provision of the lease, taken in connection with the arbitration, and the letter of the defendant *Kaukauna Company* above referred to, as well as the general conduct of the parties as shown by the evidence, quite clearly indicates that though the annual rental was not fixed in amount until the award of the arbitrators was made, yet it was contemplated that, when fixed, an equitable accounting according to the terms of the lease would be made; that the delay in fixing the amount of rent should not operate to the disadvantage of either party, but that the settlement made would place each party in the same position it would have been in had the amount of rent been seasonably fixed and paid according to the terms of the lease. Both parties were to blame for the delay in having the amount of rent fixed. Each no doubt felt that an accounting at any time based upon the terms of the lease would not prejudice any one, and hence the long delay. The defendant *Kaukauna Company* has had the use of the money which it should have paid quarterly in

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advance and which the lease provides should draw interest at six per cent. if not so paid. There is nothing in the terms of the award to militate against the idea that interest should date from the time when the payments should have been made had the rent been fixed, for it says that the *Kaukauna Company* and the city of *Kaukauna* ought, respectively, for the period for which each is liable, in justice, to pay to the *Green Bay & Mississippi Canal Company* as rent the sum of $10 per horse power per annum, payable quarterly according to the condition of the lease.

It is elementary that, in the absence of contract or of conduct evincing a contrary intent, interest is not chargeable upon an unliquidated claim. But parties may by agreement provide for interest on unliquidated amounts. They did so in this case by providing that any unpaid balance of quarterly rent should draw interest. The defendant *Kaukauna Company* has had the use of this money. It was always within its power to demand and secure a determination of the amount of rental to be paid quarterly. Its failure to do so ought not to discharge it from the obligation to pay the interest provided for in the lease. In *Laycock v. Parker,* 103 Wis. 161, 187, 79 N. W. 327, the court says: "The rule of course is that the debtor should pay interest from the time when he ought to have paid the debt. That time may be fixed by agreement." True, it was equally within the power of the plaintiff to demand and secure a determination of the amount of rental. But both parties neglected to do so. Both parties were aware of the conditions of the lease and must have understood that an award or agreement as to amount of rental when made would relate back and apply to the whole renewal period and put parties in the same situation, substantially, that they would have been in had the rental been fixed at the commencement of the renewal period. To do that, interest on unpaid balances of rent should be allowed plaintiff from the time they should have been paid had

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the amount of rent been fixed in advance. The court, therefore, erred in allowing interest only from the time of the award. The difference in such allowance from what should have been allowed is the sum of $598. This sum will be added to the judgment as of the date thereof, and as so modified the judgment is affirmed.

By the Court.—Judgment affirmed as modified. The defendant will take nothing on its appeal.

KERWIN, J. (*dissenting*). On plaintiff's appeal I think the judgment should be affirmed.

STATE EX REL. RINGER, Respondent, vs. HARPER, Appellant.

May 5—May 21, 1914.

Officers: Removal for cause: Right to a hearing: Milwaukee city charter.

Under ch. 459, Laws of 1887, giving to the mayor of Milwaukee power to remove the inspector of buildings "at any time, in case he shall neglect to perform the duties of his office, or shall for any reason be incompetent to perform the same," such inspector cannot be removed without a hearing. He is entitled to reasonable notice of the charges against him, opportunity to be heard by his witnesses and himself and counsel, and an opportunity to know of the opposing evidence and to meet it, and to have the final determination rest on evidence that reasonably supports it.

APPEAL from a judgment of the circuit court for Milwaukee county: FRANK A. ROSS, Judge. *Affirmed.*

This is an action of *quo warranto* by the relator to oust the defendant from the office of inspector of buildings of the city of Milwaukee and demanding that relator be reinstated in this office, from which he claims to have been unlawfully excluded and wrongfully deprived of the privileges and emoluments thereof.

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Upon trial of the action the circuit court made findings of fact upon the evidence adduced and determined that relator had been unlawfully excluded from his office and deprived of its privileges and emoluments. The court awarded judgment in his favor and against the defendant. This is an appeal from such judgment.

For the appellant there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

For the respondent there was a brief by *Kronshage, Hannan & McMillan,* and oral argument by *J. W. McMillan.*

SIEBECKER, J. It appears that the relator was duly appointed, confirmed, and that he qualified as inspector of buildings of the city of Milwaukee for the term of four years from the 1st day of June, 1911, and that he on this day entered the office and commenced to perform the duties thereof and continued to do so until the 31st day of July, 1912. Upon trial of the action the court found:

"That on July 31, 1912, Gerhard A. Bading, mayor of the city of Milwaukee, called complainant before him and charged complainant with neglect of duty and disregard of law in the matter of issuing a building permit for the alteration of the building located at 216 Grand avenue, and informed complainant of the condition of said building as the same was reported to said Gerhard A. Bading, which said charge was not admitted by the plaintiff but was in effect denied.

"That immediately after so charging complainant with neglect of duty, said mayor of the city of Milwaukee requested the said *Carl F. Ringer, Sr.,* to resign as such inspector of buildings, and, on his declining to do so, handed him a letter of dismissal theretofore prepared. . . ."

This letter is addressed to relator and states: "You are hereby dismissed from the office of inspector of buildings of the city of Milwaukee because of gross neglect of duty and flagrant disregard of law, . . ." and specifically basing this charge on relator's conduct in issuing the above mentioned

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building permit. The court found that relator did not, at the time he was so dismissed from office by the mayor, acquiesce therein and that he did not then or thereafter abandon his office. It is also found by the court:

"That the dismissal was peremptory and summary and without previous notice. That the plaintiff was not, previous to his dismissal, furnished any statement of the charges made against him, or given any time or opportunity to make a defense to such charges, or to be confronted by the witnesses against him, or to present counterproof thereto. . . . That no neglect of duty, either in regard to the charges upon which the dismissal was based or otherwise, has been proven in the case, . . ."

and that the defendant has entered and usurped this office, and deprived relator of the privileges and emoluments thereof on and from August 20, 1912, by and with the consent of the mayor and common council of the city of Milwaukee.

We have examined the record and find that these facts so found by the trial court are amply sustained by the evidence and hence must be held to be verities on this appeal.

Ch. 459, Laws of 1887 (Milwaukee Charter, ch. V), provides for the appointment of an inspector of buildings for the city for a term of four years beginning in the month of June, 1887, and ending the fourth year thereafter, and prescribes in what manner he shall qualify for the office, prescribes his duties, and fixes his salary. It also provides: "The mayor of the city of Milwaukee shall have power to remove such inspector at any time, in case he shall neglect to perform the duties of his office, or shall for any reason be incompetent to perform the same." It is established that when the removal from office is for cause, unless authority is conferred by law that the removal may be peremptorily made without a notice or hearing, there cannot be a removal of an incumbent from office without according him a hearing, within the principle of due process of law, which secures to him reasonable notice

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of the charges preferred as cause for removal, opportunity to be heard by his witnesses and himself and counsel, and an opportunity to know of the opposing evidence and to meet it, and to have the final determination rest on evidence that reasonably supports it. *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595; *State ex rel. Arnold v. Common Council of Milwaukee, post,* p. 505, 147 N. W. 50.

That the relator was not accorded a hearing in compliance with these rights is not disputed. It is obvious that a removal of the relator from his office by the city mayor under the provisions of the charter entitled him to a hearing. It necessarily follows that the trial court properly held that the mayor of the city acted without jurisdiction in the matter because of the failure to accord relator a hearing before attempting to remove him from the office, and that the attempted appointment of the defendant to this office is void, and that defendant's entrance into the office was unlawful and an usurpation of the office of inspector of buildings, which the plaintiff was entitled to hold and the emoluments whereof he was entitled to receive.

By the Court.—The judgment appealed from is affirmed.

YOUNG, Appellant, vs. YOUNG and others, Respondents.

May 5—May 21, 1914.

Deeds: Conditions subsequent: Conveyance in consideration of support: Rescission: Husband and wife: Parties.

1. Conveyances made by aged people in consideration of support and care are deemed to be conveyances upon condition subsequent, and will be set aside by a court of equity upon proof of substantial failure to perform.
2. Although in such a case the husband held the legal title to the property conveyed, the wife has such a substantial interest in the carrying out of the contract that she may bring an equitable

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action alone (if the husband refuses to become a plaintiff) for reconveyance of the land and rescission of the agreement, joining the husband as a defendant; and this is especially true when the homestead was a part of the premises conveyed.

3. Where the agreement for support also provides for the payment of money to third persons and makes such payment a charge on the real estate conveyed, such third persons are not only proper but necessary parties to the action for rescission, in order that their interests in or liens upon the real estate may be bound by the judgment.

[4. Whether in this case the parties would be entitled to any other relief than the revesting of the title and the rescission of the agreement, not decided.]

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Modified and affirmed.*

The plaintiff, a married woman seventy-three years of age, brings this action in equity to set aside a conveyance of a farm of 120 acres of land and the personal property thereon made by her husband and herself in favor of the defendant *Frank Young* (her son) and *Dell Young,* his wife. The plaintiff's husband, *Treffley Young,* is made a defendant. The defendants demurred (1) for defect of parties and (2) for insufficiency of facts, and the demurrer was sustained on both grounds.

The complaint alleges the making of the conveyance (which includes the homestead of the parties) in consideration of an agreement to support and care for the plaintiff and her husband during their natural lives at the homestead or at some other convenient place if the grantors became dissatisfied. The contract also requires the grantees to pay certain sums of money to six other children of the grantors at certain specified times, which payments are made a charge upon the real estate. The complaint alleges serious ill-treatment on the part of the grantees and failure to carry out the contract in many ways and to such an extent as to seriously impair the plaintiff's health. It is also alleged that the plaintiff's

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husband refuses to join in the action as a plaintiff and he is therefore made a party defendant. The plaintiff prays for a reconveyance of the property and for other relief in the alternative.

For the appellant the cause was submitted on the brief of *Isaac Craite.*

For the respondents there was a brief by *Olen & Olen,* and oral argument by *O. L. Olen.*

WINSLOW, C. J. In this court it is held:

1. Conveyances like the present, made by aged people in consideration of support and care, are deemed to be conveyances made upon condition subsequent, and will be set aside by a court of equity upon proof of substantial failure to perform. *Bogie v. Bogie,* 41 Wis. 209; *Lowrey v. Finkleston,* 149 Wis. 222, 134 N. W. 344.

2. In such a case, although the title to the real estate was in the husband, the wife has such a substantial interest in the carrying out of the contract that she is entitled to bring an equitable action alone (in case her husband refuses to become a plaintiff) for reconveyance of the land and rescission of the agreement, joining her husband as a party defendant. Especially is this true when a part of the premises conveyed consists, as here, of the homestead. This is simply the application to a new situation of an ancient and familiar equitable principle.

3. Where the agreement for support also provides for the payment of sums of money to third persons and makes such payments a charge on the real estate conveyed, such third persons are not only proper but necessary parties to an action of this nature, in order that their interests in or liens upon the real estate may be bound by the judgment. *Mootz v. Petraschefski,* 137 Wis. 315, 118 N. W. 865.

4. Whether the parties will be entitled to any other relief than the revesting of the title and the rescission of the agree-

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ment is not now decided. The measure and character of the relief to be given can be better determined after the testimony is taken and the facts are determined.

The order appealed from must be modified by reversing that part thereof sustaining the demurrer for insufficiency of facts and affirming the order as so modified, with costs to the appellant.

By the Court.—It is so ordered.

THOMAS, Respondent, vs. BEAVER DAM MANUFACTURING COMPANY, Appellant.

May 5—May 21, 1914.

Master and servant: Discharge of servant: Notice, giving reason: Justification: Other grounds: Sufficiency: Questions for jury.

1. A notice to an employee of his discharge, giving a reason therefor, does not preclude the employer from justifying such discharge upon another ground then existing, even though it was not then known to the employer.
2. Any inexcusable substantial violation by an employee of instructions, or substantial neglect of duty, or any misconduct inconsistent with the relation of master and servant and which might injuriously affect the employer's business, regardless of any express agreement on the subject, constitutes good ground for discharging the employee.
3. What constitutes sufficient ground for discharging an employee is matter of law unless provided for in the contract of employment; but where the facts are in dispute the case, under proper instructions, should be submitted to the jury.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action to recover on a contract of employment. Plaintiff claimed he was employed by defendant for one year at a salary of $1,200, payable in monthly instalments of $100, and that before expiration of such period he was discharged with-

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out cause and damages to the extent of the wages he might otherwise have earned.

Defendant claimed plaintiff was discharged for good cause, and that the balance due up to the time of such discharge was duly tendered.

The contract of employment was in writing. It obligated plaintiff, among other things:

1. To keep an accurate account of his expenses and report the same.

2. To devote all his time during the continuance of the contract to promoting the employer's interests.

3. It reserved to the employer the right to terminate the agreement on thirty days' notice for incompetency, neglect of duty, or refusal to obey instructions.

There was evidence tending to prove that plaintiff did not devote all his time to the performance of his duties; that he was unnecessarily absent therefrom one or two days a week on several occasions, and that once he was absent for some three weeks and made no account thereof to defendant. There was also evidence tending to prove that plaintiff charged as expenses $2 per day, regularly, when away from home, whether he spent this amount or not and sometimes when he did not spend anything. There was also evidence tending to prove that he disobeyed instructions on several occasions.

There was further evidence that defendant notified plaintiff by letter that his contract would expire by a particular date, mentioned, because the corporation had concluded to change its mode of selling, to which plaintiff replied that he should decline to accept a discharge except upon the conditions mentioned in the contract, to which defendant replied that, for plaintiff's benefit, he would be retained thirty days longer, if he so desired, but that at the end of that time his services would be dispensed with, adding: "If it will be any relief to you we will notify you to the effect that you have

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proved incompetent to handle our line, and furthermore that you have had certain instructions that you have not followed out as per our instructions. We hope this will be sufficient notice." At the close of the evidence the court directed a verdict for plaintiff because of there not being any satisfactory evidence of conduct on plaintiff's part warranting his discharge, and because he was not in fact discharged for bad conduct.

The cause was submitted for the appellant on the brief of *C. C. Miller* and *C. G. Cannon,* and for the respondent on that of *Julius P. Frank.*

MARSHALL, J. If when respondent was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to appellant, or whether the reason assigned for such discharge was sufficient, the trial court erred in holding that appellant was precluded by the first or any notice of discharge from proving an existing ground not therein referred to. *Loos v. Geo. Walter B. Co.* 145 Wis. 1, 6, 129 N. W. 645; *Von Heyne v. Tompkins,* 89 Minn. 77, 93 N. W. 901; *Crescent H. S. & I. Co. v. Eynon,* 95 Va. 151, 27 S. E. 935.

Under the terms of the contract appellant, acting in good faith and within the terms of its contract, had a right to determine for itself whether any of the stipulated grounds for discharging respondent existed. There being, at the best for respondent, evidence tending to prove incompetency and several substantial violations of contract duty, the trial court erred in directing a verdict in respondent's favor.

Any inexcusable substantial violation by an employee of instructions, or neglect of duty of a substantial character, or any misconduct inconsistent with the relations of master and servant and which might injuriously affect the former's business, regardless of any express agreement on the subject, constitutes good ground for discharging the employee.

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What constitutes sufficient ground for discharging an employee is matter of law unless provided for in the contract of employment; but where the facts are in dispute the case, under proper instructions, should be submitted to the jury.

It is considered here that the case was not so clearly in favor of appellant as to require condemnation of the refusal to direct a verdict in its favor, since before the commencement of the action, it duly tendered respondent the amount due him for the time he served and kept the tender good; but that appellant's rights were entirely misconceived in directing the verdict for respondent.

By the Court.—The judgment is reversed, and cause remanded for a new trial.

Voss, Respondent, vs. Voss, Appellant.

May 5—May 21, 1914.

Divorce: Trial: Denial of hearing: Prejudicial error: Misconduct of both parties: Denial of divorce: Order for support.

1. In an action by a husband for a divorce the refusal of the court, at the close of the plaintiff's evidence, to hear the evidence of defendant or her witnesses practically denied her a hearing and was prejudicial error, although her deposition, taken upon her examination as an adverse witness, was before the court.
2. Where, in an action by the husband, the evidence was that plaintiff's misconduct was grossly immoral and unjustifiable and that much of the improper conduct of the wife was provoked by his misconduct, plaintiff is not entitled to a divorce.
3. Divorces must be granted on legal grounds, not upon the views of the court as to the propriety or advisability of the parties continuing to live together.
4. In this case, upon denial of the divorce asked by the husband, an order should be made under sec. 2366, Stats., for the support of the wife and child.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought for divorce by the plaintiff hus-

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band against the defendant wife on the ground of cruel and inhuman treatment. The defendant denied the material allegations respecting cruel and inhuman treatment and set up affirmative matter by way of defense and charged the plaintiff with cruel and inhuman treatment, and demanded that the plaintiff's complaint be dismissed. The court below found that plaintiff was entitled to a divorce from the bonds of matrimony and that the defendant was entitled to the custody of the infant daughter, Esther Voss, and that plaintiff pay to defendant for support of said infant daughter $10 a month quarterly in advance until said Esther arrived at the age of eighteen years, and that plaintiff pay to defendant $2,000, together with certain household furniture. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *L. D. Jaseph.*

A. M. Spencer, for the respondent.

KERWIN, J. Several errors are assigned. It is first assigned as error that no cause for divorce was shown upon the plaintiff's own evidence; and especially in view of the fact that the defendant was not permitted to testify in her own behalf. The defendant was called as an adverse witness by plaintiff and testified, and from the evidence it is quite plain that both parties were in fault, and perhaps the plaintiff in as great if not a greater degree than the defendant. Moreover, after the plaintiff closed his evidence the defendant was denied a hearing, the court assuming that he had heard all he desired to hear and that the proper thing to do was to grant a divorce, doubtless because of the revolting character of the evidence disclosed by the adverse examination of defendant, together with the evidence of plaintiff.

The court below practically denied the defendant a hearing, refusing to hear her evidence or the evidence of other witnesses offered on her behalf. This conduct on the part of

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the court was prejudicial error and entitles the defendant to a reversal. *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595; *State ex rel. Ringer v. Harper, ante,* p. 421, 147 N. W. 633; *State ex rel. Arnold v. Common Council, post,* p. 505, 147 N. W. 50.

The court is of opinion that upon the record made the plaintiff was not entitled to a divorce. Plaintiff's conduct was grossly immoral and unjustifiable. Much of the improper conduct of the defendant was obviously provoked by the fault and misconduct of the plaintiff. Under such circumstances the plaintiff was not entitled to a divorce. *Skinner v. Skinner,* 5 Wis. 449; *Pease v. Pease,* 72 Wis. 136, 39 N. W. 133; *Hubbard v. Hubbard,* 74 Wis. 650, 43 N. W. 655. We shall not review the evidence, scandalous and grossly immoral as it is. Some of it should be expunged from the record, especially Exhibit 12. It is quite clear that the court below ordered judgment of divorce mainly for the reason that he did not think the parties could live together in harmony, not for the reason that plaintiff had made a case entitling him to a divorce. But divorces must be granted on legal grounds, not on notions of the court as to the propriety or advisability of the parties continuing to live together.

Counsel for appellant asks relief under sec. 2366, Stats., which provides:

"In a judgment in an action for a divorce, although such divorce be denied, the court may make such order for the support and maintenance of the wife and children, or any of them, by the husband or out of his property as the nature of the case may render suitable and proper."

We are of opinion that relief under sec. 2366, Stats., should be granted.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to take such further evidence as may be necessary and grant the defendant the relief provided for by sec. 2366, Stats.

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WETTENGEL, Respondent, vs. UNITED STATES "LLOYDS," Appellant.

May 5—May 21, 1914.

Insurance: Automobiles: Collision.

Damage to an automobile caused by its running off the main road and down a bank into a river was not covered by a policy insuring against damage "by being in collision . . . with any other automobile, vehicle or object, excluding . . . damage caused by striking any portion of the roadbed."

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Reversed.*

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *C. B. Quarles.*

For the respondent the cause was submitted on the brief of *Julius P. Frank.*

TIMLIN, J. The respondent had from the appellant a policy of insurance against loss or damage by fire covering an automobile. This policy carried the following rider or slip attached:

"In consideration of an additional premium of $36 this policy also covers, subject to its other conditions, damage to the automobile and equipment . . . by being in collision during the period insured with any other automobile, vehicle or object, excluding . . . damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam or electric railroads," etc.

The evidence showed without contradiction that during the period of insurance and on October 11, 1912, with consent of the respondent, this automobile was being used by an agent of the respondent for pleasure riding at night, and that this agent by accident ran the automobile off the main road and down a bank of three or four feet into the river, causing damage to the car. The municipal court found that the automobile was damaged in a collision by being precipitated into the East river in the city of Green Bay.

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This accident is so obviously outside of the quoted stipulation of the policy that discussion seems superfluous. In order to bring the case within the policy there must have been, first, a collision; second, the collision must have been with another automobile, vehicle, or somewhat similar object, *ejusdem generis;* and third, it must not have been with any portion of the roadbed, meaning the ground on which the machine was running or attempting to run. No such collision was shown as that insured against.

In *Harris v. American C. Co.* 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. N. S. 70, the policy was different. In this court that decision has merely advisory value, and we are disposed to doubt its soundness even upon the different contract there in question.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

KOEFFLER, Plaintiff in error, vs. THE STATE, Defendant in error.

May 5—May 21, 1914.

Police power: Health regulations: Validity: Requiring landlord to provide garbage receptacles: Statutes: Partial invalidity.

1. In the exercise of its police power the state may enact reasonable health regulations, and only when the power has been clearly abused will the courts declare such regulations void.
2. A statute (sec. 1636—151, Stats. 1911) providing that "the owner of every apartment house, tenement house, lodging or boarding house, shall furnish suitable covered receptacles for garbage, ashes and rubbish," was not invalid as being unreasonable and oppressive, nor because of indefiniteness in that it failed to define specifically the kind of receptacles to be provided.
3. Such a provision contained in a health statute should not be held void merely because some other provision of the statute, dealing with a different subject, might be invalid.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The cause was submitted for the plaintiff in error on the

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brief of *C. A. Koeffler, Jr., in pro. per.,* and for the defendant in error on that of the *Attorney General, Edward Yockey,* district attorney, and *Henry S. Sloan,* first assistant district attorney.

BARNES, J. The plaintiff in error was convicted for violation of the following provision contained in sec. 1636—151, Stats. 1911: "The owner of every apartment house, tenement house, lodging or boarding house, shall furnish suitable covered receptacles for garbage, ashes and rubbish." He urges that the statute is void because it is unreasonable and oppressive, and also because of indefiniteness in that it fails to specifically define the kind of receptacles that must be provided.

Sec. 1636—151 was repealed by ch. 588, Laws of 1913, but the repeal does not affect this action. It was a health statute. Whether or not all of its provisions were valid, we do not feel called upon to decide. The sentence above quoted deals with the subject of garbage. The rest of the statute dealt with other matters. We think the garbage provision, if otherwise valid, should not be held to be void because some other provision of the law dealing with a different subject might be invalid. *Brittingham & H. L. Co. v. Sparta, ante,* p. 345, 147 N. W. 635, and cases cited therein.

The state in the exercise of its police power had the right to pass reasonable health regulations. It is only where the power to regulate has been clearly abused that the courts will declare the manner of its exercise to be in violation of constitutional rights. *Cream City B. P. Co. v. Milwaukee,* 158 Wis. ——, 147 N. W. 25, and cases cited therein. Garbage is often temporarily stored outside of buildings until it is carted away. It is generally offensive and forms a breeding place for flies, and we do not understand that it is claimed that the city might not properly require that garbage be stored in inclosed receptacles. Whether it is or not, we do not think there is any doubt about the right of the state to require that it be so kept. The real objection to the law is that it is

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made the duty of the landlord to provide the receptacle, instead of the duty of the tenant who creates the garbage. Uncovered garbage is just as likely to affect the health and comfort of the occupants of adjacent premises as it is that of the tenant who is responsible for it. It is not unreasonable to require the owner of a parcel of land to see that his premises are so used as not to constitute a nuisance as to the occupants of adjacent premises. This refuse must of necessity be stored some place if only for a short time, and we do not think the provision requiring the landlord to furnish the storage receptacle is so far without the bounds of reason as to warrant the court in holding it void. It would hardly be said that the owner of such a building as is described in the statute could not be required by law to provide suitable water closets for the use of his tenants, and yet as far as the general public health is involved the difference between these two conveniences is one of degree only.

Concerning the indefiniteness of the law, little need be said. Almost any water-tight receptacle that has a well-fitting cover will answer the purpose of the law. The legislature could not well go into details as to the dimensions of the receptacle or the material out of which it should be made. Its size must depend in a large degree on the quantity of garbage that is to be stored. This depends on the character of the occupancy of the building and the number of tenants who use a single receptacle. We think any one making an honest effort to comply with the law in the way of securing a suitable receptacle will not encounter very much difficulty in doing so. We suppose that garbage cans are commonly kept for sale in hardware stores in cities. Cans sufficiently large for the accommodation of the garbage accumulations from a large apartment house or boarding house may not be kept in stock by hardware dealers, but they can be readily made.

By the Court.—Judgment affirmed.

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KOCH, Plaintiff in error, vs. THE STATE, Defendant in error.

May 5—May 21, 1914.

Intoxicating liquors: Licenses: Limit.

The ratio limit fixed by sec. 1565*d*, Stats., having already been exceeded in a town, no license could be granted for the sale of liquor therein upon premises which, though used under a valid license for saloon purposes up to June 30, 1907, had thereafter for more than three years ceased to be used for such purposes, where the applicant was not a person who, for the reasons stated in said section, might be licensed to continue the sale of liquor in a changed location.

ERROR to review a judgment of the circuit court for Forest county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

The plaintiff in error was convicted of selling intoxicating liquors without a valid license, and brings his writ of error to reverse the judgment. The facts were not in dispute. The premises on which the plaintiff in error was conducting a saloon business at the time of the alleged illegal sale, viz. September 8, 1913, are situated in the town of Wabeno, Forest county, and were used for saloon purposes by one Krueger under a valid license June 30, 1907. They ceased to be so used on the following day, remained vacant for a time, were used for a year for a general store, and on January 24, 1911, were again used for saloon purposes. At this time the plaintiff in error, who had not theretofore been engaged in such business, obtained a license from the town authorities for that purpose, rented the premises, and commenced to use them for saloon purposes. At the time this license was issued there had been theretofore granted by the town saloon licenses in excess of the ratio limit prescribed by sec. 1565*d*, Stats. How long business was done under this license does not appear. On June 16, 1913, the town board granted ten saloon licenses, the population of the town being but 1,877. On the following day the board in form granted a license to

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the plaintiff in error. He did not take it out of the clerk's office until September 5th following.

The cause was submitted for the plaintiff in error on the brief of *P. J. Winter,* and for the defendant in error on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

WINSLOW, C. J. The ratio limit fixed by sec. 1565*d,* Stats., having been exceeded before the license in question was granted, that license must be void unless the case comes within the exceptions named in the section.

Following the previous decisions of this court upon said section, viz. *State ex rel. Marvin v. Larson,* 153 Wis. 488, 140 N. W. 285, and *Zodrow v. State,* 154 Wis. 551, 143 N. W. 693, it must be held that the present case does not come within those exceptions. The purpose of the exceptions was, notwithstanding the ratio limit may have been passed, (1) to make it possible for the use of the premises for saloon purposes to be *continued;* (2) to make it possible for the tenant to be licensed to *continue* the business at another place if for certain named reasons he could not continue it on the premises. The entire discontinuance of the use of the premises for saloon purposes after July 1, 1907, for more than three years takes them out of the first class of exceptions, and there is no claim that plaintiff in error comes within the second class.

By the Court.—Judgment affirmed.

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KRENN and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

May 5—May 21, 1914.

Criminal law: False pretenses: Information: Sufficiency: Instructions to jury.

1. An information charging in substance, among other things, that defendants designedly and with intent to defraud obtained from one R. certain personal property, and also obtained his signature to a bill of sale thereof and to a deed conveying his farm to one of the defendants, by means of false pretenses and representations that said grantee was a man of great wealth, worth more than $60,000, and of high standing and credit, that two notes and a mortgage given by said defendant to R. were good and sufficient security for the purchase price of said farm and property, and that said mortgage conveyed and was a lien upon said farm and was given to secure the purchase price thereof, is *held* to state an offense under sec. 4423, Stats.
2. The representations so alleged were of existing facts, not mere promises or expressions of opinion, except the statement as to the sufficiency of the notes and mortgage as security, and the jury having been properly instructed that that statement did not constitute false pretenses in any view, there was no prejudicial error.

ERROR to review a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

The cause was submitted for the plaintiffs in error on the brief of *Charles D. Smith,* and for the defendant in error on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

KERWIN, J. The plaintiffs in error were charged in the information, among other things, with having on the 5th day of March, 1913, obtained by false pretenses the signature of one Charles Rinke to a deed of land and a bill of sale of personal property located in Oconto county, Wisconsin. There was a plea of not guilty and trial before a jury. The plaintiffs in error were both found guilty as charged in the information and sentenced to one year imprisonment in state's prison at Waupun.

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Errors are assigned upon which counsel for plaintiffs in error claim reversal.

1. It is insisted that the information should have been quashed because it did not state an offense. It charged in substance that

"on the 5th day of March, A. D. 1913. at said county of Oconto, *James Timmins* and *Henry F. Krenn* did unlawfully, knowingly and designedly, falsely pretend to one Charles Rinke that the said *James Timmins* was a man of great wealth, worth more than $60,000 and of high standing and credit; that the two notes hereinafter mentioned and that a certain mortgage [here the mortgage is described as conveying land in Fond du Lac county, and the notes are also described] . . . both said notes and said mortgage being made to Charles Rinke, and then and there delivered to said Charlie Rinke, *alias* Charles Rinke, were good, sufficient and ample security for the principal and interest mentioned in and evidenced by said promissory notes and that they were good and sufficient security for the purchase price of the farm and personal property of the said Charles Rinke, to wit: [here description of the farm in Oconto county] together with all personal property thereon, save and except the clothing and household equipment of the said Charles Rinke; and that said mortgage conveyed and was a lien upon the last above described real estate and was given to secure the purchase price of the same and the said Charles Rinke believed the said false pretenses aforesaid and being deceived thereby was induced by reason of the false pretenses and representations so made as aforesaid, to deliver, and did then and there deliver to the said *James Timmins* all of the personal property upon his said farm, to wit: six cows, two yearlings, one six-weeks-old calf, two horses, one hundred bushels of corn, seventy chickens, one mower, one drag, and two plows, all of the value of $500, and by reason of the false pretenses and representations so made as aforesaid, the said *Henry F. Krenn* and *James Timmins* did then and there, with intent to defraud, obtain the signature of said Charles Rinke, *alias* Charlie Rinke, to a deed of conveyance of [here describing the farm of Charles Rinke in Oconto county] the face value of $3,000, and the said *Henry F. Krenn* and

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James Timmins did also then and there, with intent to defraud, by reason of said false pretenses and representations so made as aforesaid, obtain the signature of said Charles Rinke, *alias* Charlie Rinke, to a bill of sale of all the personal property aforesaid, the face value of said bill of sale being $500, and the said *James Timmins* and *Henry F. Krenn* did then and there unlawfully, knowingly and designedly, obtain from said Charles Rinke the property aforesaid and the signature of said Charles Rinke, *alias* Charlie Rinke, to a deed of conveyance and bill of sale aforesaid, with intent then and there to defraud—whereas, in truth and in fact the said *James Timmins* is a man of no financial standing, no credit whatever, and whereas, he is not worth $60,000 or any considerable sum of money whatever, and whereas the said notes and mortgage given to secure the same are of no value whatever, and were not either of them notes at all and did not evidence any liability of *Timmins* or of any one, and the land upon which said mortgage is a lien is incumbered and was incumbered upon and prior to the date of said mortgage for its full value and whereas said mortgage given to secure said note is not a lien upon and does not convey the [here describing the farm of Charles Rinke in Oconto county] but that the same does, on the contrary, in fact in terms convey and is in terms a lien upon [here describing the farm in Fond du Lac county] subject, however, to prior mortgages, liens, judgments and incumbrances, aggregating the full value of said real estate as the said *James Timmins* and *Henry F. Krenn* then and there well knew, against the peace and dignity of the state of Wisconsin."

This information clearly states an offense under sec. 4423, Stats.

2. It is further insisted by counsel for plaintiffs in error that the evidence was not sufficient to sustain the verdict. It is wholly unnecessary to go into a discussion of the evidence. The record shows that it is ample to support the verdict. Counsel for plaintiffs in error further argues that there was a variance between the information and the proof. We do not so understand the evidence. It is quite clear that the material allegations of the information were proved.

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It is also said that the alleged representations were not of an existing fact, but were in the form of a promise or expression of opinion. It will be seen from the material allegations of the information that this position is not well taken. It may well be that the information is not in as good form as might be desired, but under our statutes and practice it is sufficient. Secs. 4706, 2829, 3072, Stats.

While there is some surplusage in the information and perhaps some allegations in the nature of promises or expression of opinion they were not prejudicial here, since the rights of the defendants were sufficiently guarded by the charge, and the jury found the plaintiffs in error guilty of obtaining by false pretenses personal property to the amount of $275 and the signature to a deed of real estate of the value of $2,600, and the court charged the jury that the statute refers to obtaining money, goods, wares, merchandise, or other property by false pretenses and also obtaining the signature of any person to any written instrument the false making whereof would be punishable as forgery; and also charged the jury as to the portion of the information alleging that the defendants falsely represented the mortgage given by said *Timmins* to Rinke was a good and sufficient security for the notes and indebtedness mentioned therein, as follows:

"You are instructed that such representations, if any such were made, are mere expression of opinion and are not a representation of fact and did not constitute false pretenses in any view, and you are not authorized to find the defendants or either of them guilty upon account of any such representations if made."

We are convinced that the charge of the court to the jury was fair, the law correctly stated, and that the plaintiffs in error had a fair trial and that no prejudicial error was committed.

By the Court.—The judgment of the court below is affirmed.

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SADOWSKI, Administratrix, Respondent, vs. THOMAS FURNACE COMPANY, Appellant.

November 19, 1913—June 17, 1914.

Master and servant: Death of servant: Unsafe working place: Construction of statutes: Questions for jury: Contributory negligence: Warning of danger: Special verdict: Failure to submit material issue, when error: Excessive damages.

1. Secs. 2394—48, 2394—49, Stats., are a part of a new system relative to industrial accidents, by which it was intended to substitute, in lieu of the ordinary rule requiring the master to come up to the standard of reasonable safety as to working place and conditions, the absolute duty to make the employment and place of employment as safe as the nature of the employment will reasonably permit.
2. The ordinary rule as to construing legislation in derogation of the common law strictly against a purpose to change it, is not to be applied to efforts to create a new system for dealing with personal injuries to employees, but, the legislative purpose being clear to approach the ideal of affording compensation for loss in substantially all cases of accidental injury to employees in the course of their employment, the language of the statute, where open to construction, should be read liberally in favor of that purpose.
3. Since it would be very difficult to say, as a matter of law, when the physical conditions and acts requisite to satisfy the statute appear conclusively by the evidence, the question of the employer's compliance with the statutory duty must usually be for the jury.
4. Where a fact which is a legitimate basic ground of a cause of action or defense is, specifically or inferentially, plainly pleaded and denied, or is raised on the trial by evidence and enters into the case to all intents and purposes the same as if pleaded, such fact is not evidentiary merely, but a fact in issue, and upon proper request should be submitted to the jury by an appropriate question in the special verdict; and denial of such a request is error. So *held*, where an allegation that defendant failed to warn plaintiff's intestate of the dangers of his working place was denied in the answer and there was evidence that the deceased had been warned of the danger and ordered not to work in the dangerous place.
5. Failure to submit a material issue of fact on request may sometimes be cured by instructions, but a request for submission of

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a question covering a vital matter, and refusal thereof duly excepted to, will support an assignment of error for want of sufficient instructions, where those given do not cover the subject.

6. Where the earning power of deceased, who was thirty-two years of age and left surviving him a wife and three small children, was about $425 a year, damages in excess of $5,000 for his death would be regarded as excessive. SIEBECKER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action by the personal representative of John Sadowski, deceased, to recover compensation for his death.

The deceased, while in the employ of the defendant, came to his end by a large quantity of iron ore, compacted by freezing into a hard mass, rolling down from the top of a bank, at the foot of which he was working. His duties required him to assist in transferring iron ore from a large mound thereof by wheeled vehicles to a furnace. The mound was around twenty feet high. The operation of removing ore therefrom included filling the conveying appliances at the foot thereof. It resulted in there being a bank sloping from where loading operations were conducted back some ten or twelve feet and angling upward to the crust which had formed by freezing. It was necessary in order to render the working place safe for the crust to be kept broken down. There was a crew for that particular work. They did not blast at the crust which caused the accident because of being short of blasting material. Plaintiff knew the danger incident to an overhanging crust of ore in case of his being engaged at the foot of the bank. From his working place the conditions as to overhang, necessarily, came frequently under his observation, and could be seen any instant by any effort to do so. There was no difficulty in that regard from want of light. The operation of taking ore from the foot of the bank proceeded at the rate of some sixteen tons per hour. The men ordinarily chose their own particular place and did

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so on the occasion in question. They, ordinarily, had to change their location according to operations of the crew above. Such crew on the particular day, worked with sledges, and by drilling holes and driving in wedges. The crust did not yield to their efforts and was abandoned before the accident. There was considerable overhang, plainly observable some time before the instant of the accident. The deceased had been admonished to look out for the danger, but chose to continue his work at the particular place. There was evidence to the effect that he was ordered not to work under the overhanging crust and declined to obey, saying he would watch out for himself. The crust broke some distance further back than the point where the crew above had made efforts to dislodge it. The deceased was working at the time close up to the bank and as near the overhang as practicable.

The negligence claimed and found by the jury was: 1. Failure to furnish a working place as free from danger as the nature of the employment would reasonably permit. 2. Failure to adopt and use means reasonably adequate to render the employment and place of employment safe. The jury found that such failure proximately caused the accident without contributory negligence of co-employees or the deceased. There was a specific allegation in the complaint of failure to warn deceased of the dangers of his working place, a denial of such allegation, a request to submit that specific issue to the jury, and refusal thereof. There was also a request for submission of whether the deceased was not ordered to cease working in the place of danger and move to another and safe place pointed out and that he declined to do so. The testimony on the subject of damages was to the effect that deceased was thirty-two years old, was a common laborer, capable, in general, of earning $1.75 per day, had been married some eleven years, and not been able to accumulate much of anything or to earn more than what was necessary to sup-

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port his family, consisting of his wife and three children, aged four, six, and nine years, respectively. The jury found as follows: Defendant did not furnish deceased a place of employment as free from danger to life and safety as the nature of the employment would reasonably permit, nor adopt and use methods and processes reasonably adequate to render the employment and place of employment of deceased safe. Such faults were the proximate cause of the death of the deceased without contributory want of ordinary care of co-employees or himself. The damage to the widow is $7,500. Judgment was rendered in plaintiff's favor on the verdict, exceptions being duly saved essential to the questions discussed in the opinion.

For the appellant there were briefs by *Doe & Ballhorn,* and oral argument by *J. B. Doe.* To the point that the court erred in refusing to submit the questions as to whether or not deceased was warned against working at the place where he was injured, they cited *Heddles v. C. & N. W. R. Co.* 74 Wis. 239, 258, 42 N. W. 237; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Wawrzyniakowski v. Hoffman & B. M. Co.* 146 Wis. 153, 131 N. W. 429; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865.

For the respondent there was a brief by *John C. Kleczka* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. Kleczka* and *Mr. W. L. Gold.*

The following opinion was filed March 17, 1914:

MARSHALL, J. Questions raised by appellant's counsel and not mentioned in this opinion, are to be regarded as having been passed as not of sufficient consequence to merit a place in the record of this case.

The faults which the jury found defendant guilty of, resulting in decedent's death, were failure to perform the statutory duties of an employer to furnish his employee a place of employment "as free from dangers to life and safety as the

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nature of the employment would reasonably permit" and "adopt and use methods and processes reasonably adequate to render the employment and place of employment of the deceased safe." Those requisites are found in secs. 2394—48 and 2394—49, Stats. They are a part of the new system in relation to industrial accidents adopted by chs. 485 and 664, Laws of 1911, whereby the common defenses of assumption of risk and negligence of fellow-servants were abolished, employers, with some exceptions, were given the option to surrender the right to the defense of contributory negligence and submit to liability, according to legislative standards, practicably on a basis of insurance, for all losses to employees and their immediate dependents specified, caused by personal injuries, not self-inflicted, happening in their line of employment, and the standard of care to be exercised by employers as to safety of employment, safety of working place, and protection against danger, both as to the employment and the working place during working operations, was particularly prescribed, and the industrial commission was empowered to supervise employments and places of employment and make and enforce orders and regulations needed, or appropriate, to enforce the statutory duties of employers.

Thus the whole field wherein employees in the course of their employment may be injured, was covered,—common-law standards of compensation, recoverable in the common-law way, being left undisturbed as to any employer not coming under the new system so as to waive the defense of contributory negligence,—the absolute duty was created of accomplishing physical results for prevention of industrial accidents, and the industrial commission was empowered with authority to supervise and coerce as to performance of such duties. The legislative purpose is manifest. The language creating the duties mentioned is broad, general, and in unmistakable words of positive command.

Counsel for appellant contend that the trial court dealt

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with the cause upon a wrong theory; that the legislative requirements aforesaid, standing alone, do not add to the common-law standard of care, and that they have little or no vitality until the industrial commission acts under its supervisory authority and prescribes what shall and what shall not be done to satisfy them; but it seems to follow from what has preceded that they are wrong. The legislature, quite clearly, intended to substitute for the ordinary rule requiring the master to come up to the standard of reasonable safety as to working place and working conditions,—often tested by the customary practice under the same or similar circumstances, and efficiency as to all dangers reasonably to be apprehended from the viewpoint of ordinary care,—the absolute duty to make the employment and place of employment of employees, not reasonably safe merely, but as safe as the nature of the employment will reasonably permit. In the plainest of mandatory language that was done by sec. 2394—41, sub. 11, defining the words "safe" and "safety" in connection with sec. 2394—48, followed in like mandatory language by sec. 2394—49, creating the duty of the master to not permit an employee to submit himself to any of the dangers designed to be guarded against; and in like mandatory language creating the duty of the employer to "provide and use safety devices and safeguards" and not to fail to "adopt and use methods and processes reasonably adequate to render the employment and place of employment" "as safe as the nature" thereof "will reasonably permit," and not "to fail or neglect to do every other thing reasonably necessary to protect life, health, safety or welfare of employees" and not to "occupy or maintain any place of employment" that is "not as safe as the nature of the employment will reasonably permit."

There is little use in enlarging on the plain words of the statute. They must be taken as meaning just what they express, no attempt being made to minimize in favor of employers because of the heavy burdens, seemingly, by the lit-

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eral sense of words, cast on them. The language in such sense, is not ambiguous under the circumstances characterizing its use. From the viewpoint of modern conditions, modern needs, and modern conceptions of moral obligations to those engaged as employees in supplying the necessary and legitimate requirements of mankind, and that subjects produced to that end necessarily embody the personal injury losses incident thereto, so that the hand of the employer, in repairing such a loss, is but a link in a chain reaching from the field of production in which it accrued to and terminating with that of consumption,—all cast of unreasonable burden upon employers vanishes and there arises that of legislative recognition of serious faults in the old system, endeavor, as fully as practicable, to remedy them, and intent that efforts in that regard shall be taken as broadly as the language used to express them will reasonably permit and is appropriate to carry out the beneficent purpose. The court has spoken several times before on this subject and endeavored to make it plain that the common rule as to construing legislation in derogation of the common law strictly against a purpose to change it has little or no application to the efforts to create a new system for dealing with personal injuries to employees. History leaves no fair room for doubt as to the purpose being to approach the ideal of affording compensation for loss in substantially all cases of accidental injury to employees in the course of their employment. Therefore the legislative language, where open to construction, should be read liberally in favor of that purpose. *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179; *Kosidowski v. Milwaukee,* 152 Wis. 223, 139 N. W. 187. The progressive tendency in that regard appears strikingly significant by the change in 1913 of the Statutes of 1911 so as to abolish the defense of contributory negligence in cases of this sort.

So whether there was evidence to carry the questions submitted to the jury in the language of the statute as to alleged

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fault of respondent cannot be tested merely by what was reasonably necessary to the safety of decedent's working place, and his immunity from danger of harm in the course of his operations, nor the essential under common-law rules of a reasonably safe working place, nor by any other standard than that of the statute. By that standard there was ample evidence to go to the jury as to responsible fault of appellant. It would be very difficult to say, as matter of law, when the physical conditions and acts requisite to fully satisfy the statutory requirements appear conclusively by evidence. The legislature evidently endeavored to remove the question as exclusively as practicable into the field of jury interference. It left the field for the court far too narrow to include this case. To demonstrate that we need not refer to the evidence in detail. Its general character, indicated in the statement, is sufficient. Indeed, we understand from counsel's argument they do not really claim there was not evidence to carry the questions submitted as to fault of defendant, to the jury, if the statutory duties we have discussed apply; and of that we have no doubt.

One of the efficient violations of duty charged by respondent and denied by appellant, is failure to warn decedent of the danger which resulted in his death. The evidence was directed to that point as one vital to respondent's right to recover. Appellant's counsel by several requests for submission of questions in the special verdict—including one as to whether decedent was not specifically ordered not to work at the particular place, but go to another specified, where there was no overhang of frozen ore—efficiently challenged the court's attention to this important phase of the case. The requests were not only refused but the instruction on the subject of contributory negligence did not cure the omission.

It is no answer to the contention of appellant's counsel to say that whether there was efficient fault on respondent's part in failure, as alleged, to warn, is mere evidentiary matter

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bearing on safety of place of employment, safeguarding thereof and of employees during performance of their labor, and contributory negligence. No fact is merely evidentiary which is a legitimate basic ground of a cause of action or defense, and is properly pleadable as such. When such a fact is specifically or inferentially plainly pleaded and denied by answer, or is raised on the trial by evidence and enters into the case to all intents and purposes the same as if pleaded, it is neither in the nature of a conclusion of law or mixed law and fact, or merely evidentiary matter; but is a "fact" within the meaning of sec. 2857, Stats. 1911, providing that a special verdict is one "where the jury find the facts only, leaving the judgment to the court," and the issue in respect thereto one of the "material issues of fact," to be established by evidence and required under sec. 2858, Stats. 1911, to be submitted to the jury in the form of a question in such form as to admit "of a direct answer." All such facts, as distinguished from mere conflicts in evidence, and only such, are to be so submitted. The statute, in very plain language, requires that and practically prohibits such submission of any other matter, and this court has thus dealt with the statute so many times as to leave little or no room for excuse for not following its command.

Upon counsel making a proper demand for a special verdict he secures for his client the benefits of a statutory right. Judicial conservation of that right, by carefully following the requirements of the statute in framing the verdict so as to include therein all which should be included, and exclude all which should be excluded, submitting a question, covering in concise plain language, admitting of a direct answer for each issue of fact raised by the pleading and controverted by the evidence, or pleadable and properly raised by evidence, and guarding carefully against double questions and questions calculated to invite inconsistent answers,—will make the special-verdict law the valuable instrumentality the framers of

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the Code designed it to be. Like many features of the written as well as of the unwritten law, most of the difficulties attending its application are faults of administration which may easily be remedied by courts, instead of fault in the law.

What has been said as to the nature of a special verdict and the importance of care in according the statutory right, not adding thereto nor taking therefrom, is but a reiteration of what has been said many times before, but seems appropriate to be repeated occasionally, to the end that justice may not miscarry by failure to comply with the plainly judicially expounded statute. The decisions of this court on the subject have been so numerous that reference to them now is deemed unnecessary and inadvisable.

True, in a broad sense, the question of safe working place, and efficient conservation of safety during working operations, includes the subject of warning against dangers, and notice not to work in a dangerous place as, also, the subject of contributory negligence; but, nevertheless, failure to warn being pleaded, as in this case, as a substantive ground of liability, it is a fact in issue rather than mere evidentiary matter. Therefore, it was plain error not to submit a question on the subject. *Sufferling v. Heyl & Patterson,* 139 Wis. 510, 516, 121 N. W. 251; *Harper v. Holcomb,* 146 Wis. 183, 194, 130 N. W. 1128; *Szewczyk v. E. W. Ellis L. Co.* 146 Wis. 452, 459, 131 N. W. 977; *Wawrzyniakowski v. Hoffman & B. Mfg. Co.* 146 Wis. 153, 162, 131 N. W. 429.

While failure to submit a question covering some particular material issue of fact may sometimes be cured by instructions, the better practice is to follow the statute strictly, *Wawrzyniakowski v. Hoffman & B. Mfg. Co., supra;* but where the difficulty is not thus obviated the error is of serious nature. That here falls within such class. There was a refusal to submit the question of warning, notwithstanding evidence tending to prove that decedent was ordered to cease working in the place of danger and go to another, pointed out as free from peril; and the jury were so instructed on the

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questions of contributory negligence as to suggest that all testified to as to admonishment of the decedent might be true, and yet he not have been guilty of contributory negligence.

It may be that, since it was appellant's duty not to permit decedent to work in a place not as free from danger as the nature of the employment would permit, he might have been merely warned against the peril which he was in and yet not have been guilty of contributory negligence, as matter of law, in continuing his work. In that respect the common-law rule, recognized in many cases, in view of the statutory duty of the defendant to go further than to merely warn of danger,—to go to the extent of warning of such emphatic character as to take the cast of prohibiting continuance in the place of danger, would not necessarily govern. But a warning of such emphatic character as the one testified to and neglect to heed it would involve efficient contributory fault. So there was no way the court could have rendered failure to submit the question under discussion harmless, except to have plainly instructed the jury that if the decedent was admonished to cease operations in the dangerous place he was guilty of contributory negligence as a matter of law.

It has been suggested that the instruction referred to was not excepted to, as not sufficiently specific, and that no further instructions were asked, also that failure to prohibit the deceased from working in the place of danger was not a matter in issue under the pleadings. The answer to that is that the pleaded facts, as to want of safe working place and failure to warn, by reasonable, if not necessary, inference covered failure to warn of danger to the statutory extent, and the request to submit the question as to whether the decedent was ordered not to continue at work in the dangerous place was sufficient to challenge attention of the court to the fact that, if such circumstance occurred, deceased was guilty of contributory negligence as matter of law and require an instruction to that effect or submission of the question.

A request for submission of a question covering a vital

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matter and refusal duly excepted to, furnish good ground for complaining of want of sufficient instructions, where those given do not cover the subject. *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 480, 80 N. W. 752.

From the foregoing it will be seen that the refusal to submit the questions as to warning, particularly the one as to the decedent having been ordered to cease working in the place of danger, was prejudicial error for which the judgment must be reversed.

The further complaint is made that the damages assessed are excessive. That needs attention to aid in closing the litigation without necessity for again appealing. The recovery could not properly exceed the amount of the pecuniary loss to the widow. That must be measured by the present worth of such portion of what decedent would probably have earned had he lived his expectancy of life, as would, with reasonable certainty, have inured to her. On that basis, there does not seem to be good reason for awarding respondent the sum of $7,500. The earning power of decedent was around $425 per year. He was thirty-two years of age. His expectancy of life was around thirty-three years. His earning power, on the average, for that period could not fairly be taken at more than $350 per year nor more than $200 beside the necessary outlay for himself. So the limit of pecuniary loss to her was $200 per year during his expectancy of life. It might be much less. Reduced to a reasonable certainty, doubtless the $200 would need to be substantially diminished. Four thousand dollars would purchase an annuity for the widow of $200 per year.

Therefore it seems reasonably certain a jury on the evidence before us might place the recovery as low as $4,000. If the cause were to be remanded with permission to take judgment and avoid a new trial it could not be for more than $4,000. Since it must go back for a new trial there will be opportunity for a second jury verdict, but as a guide to

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speedy, final determination, it is considered best to say that a recovery on evidence similar to that now here of more than $5,000 would be fatally excessive.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

KERWIN and TIMLIN, JJ., dissent.

SIEBECKER, J. I concur in the reversal of the case and the ordering of a new trial, but I do not concur in the direction that more than $5,000 would be fatally excessive as damages.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

HANSON, Executrix, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

February 6—June 17, 1914.

Railroads: Death of employee: Interstate commerce: Waiver of objection that federal statute governs: Negligence: Flying switch: Violation of rule: Questions for jury: Appeal: Harmless error: Evidence: Admissions: Opening statement of counsel.

1. In an action for the death of a railway employee, the objection that the decedent was employed in interstate commerce and hence that the case is governed by the federal statute is waived if not raised before or during the trial.
2. Any movement of a train in switching whereby, while the train is in motion, a part of it is cut off, increased speed given to the engine, the detached cars also kept in motion and following the engine at a less speed and allowed to run on to a switch track, has been understood to be a flying switch; and in this case there was sufficient evidence to sustain a finding that the movement of the train during which plaintiff's intestate was killed, though sometimes called a drop switch, was a flying switch

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within the meaning of a rule of the defendant company by which flying switches were forbidden except at spur sidings.

3. The fact that a flying switch was made in violation of a rule forbidding it is sufficient to support a finding of negligence on the part of the conductor or engineer who was responsible for its being made.

4. The question whether the negligence of a railway company or its agents contributed in a greater degree to produce an injury than the negligence of the injured employee, is peculiarly a jury question.

5. Whether a statement by plaintiff's counsel, in opening the case, of one of the facts which they intended to prove, should be received in evidence, when offered by defendant, as an admission of that fact on the part of the plaintiff, is not decided. Its exclusion in this case was not prejudicial error, since it was made a part of the record and defendant's counsel was allowed to comment on it in his argument to the jury.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action to recover damages for the death of the plaintiff's testator, Christ Hanson, who was a bridge foreman in charge of all bridge repairs on the Superior division of the defendant railway, which division extends from Northern Michigan to Milwaukee. The facts were substantially undisputed, and were as follows:

On August 4, 1911, the conductor in charge of a freight train on the Superior division received orders to pick up Hanson and his crew at Hilbert Junction and to distribute bridge material as designated by him between Hilbert Junction and North Milwaukee. Hanson would inform the conductor in advance at what points the material was to be unloaded and the train crew would attend to the stopping and placing of the cars, which were all flat cars. Through a mistake on the part of Hanson some material which should have been unloaded north of Hayton had been carried past, and Hanson was desirous of having the car containing that material sent back without rebilling it. At a station called Fredonia, not far from Cedarburg, Hanson again told the con-

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ductor he wished the car could go back without reporting it, and the conductor agreed that Cedarburg was the most convenient place to drop the car in, from where it could be returned the next morning to Hayton without rebilling or reporting it. The car containing the material which was to be returned the next morning was the fourth car from the rear, counting the caboose. When the train came into Cedarburg it came to a full stop and the last two cars and the caboose were uncoupled from the rest of the train. The forward part of the train then pulled ahead for a short distance and stopped, with the rear car, the one to be thrown in on the switch, containing the bridge material, some distance from the switch leading in on the sidetrack. The brakeman then cut the air from this car, the train pulled ahead, and on a proper signal slacked so that the pin could be pulled, which was done, the balance of the train pulled away past the switch which was then thrown, and the rear car—containing the bridge material—ran in on the sidetrack; the rear of the train, consisting of the caboose and two cars, remaining stationary on the track. Before reaching Cedarburg, Hanson with his men had been riding on the sixth car from the rear, but before the switching operation commenced he left this car, walked back to the rear of the car just ahead of the car to be dropped, and sat or kneeled on the extreme north end thereof. The switchman who was riding on the south brakebeam of the fourth car (*i. e.* the car which was to be dropped) testifies that Hanson was on the north end of the fifth car within a few feet of him, kneeling down at the end of the car apparently ready to pull the pin on that car, and he (the brakeman) said to him (Hanson), just before the engine slacked, "Never mind, I have got it," and pulled the pin on the fourth car as the engine slacked and swung himself up on to the front end of that car. When the pin was pulled and the signal given, the engine started ahead quickly, and when the forward part of the train had reached a distance of four

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or more car lengths from car number 4, the brakeman saw deceased on his hands and knees in the middle of the track under the front end of car number 4, where he was killed. The pin on car number 5 was not pulled.

The jury returned a special verdict as follows:

"(1) Was Christ Hanson, at or immediately preceding the time he was injured, engaged in assisting or attempting to assist in uncoupling the car that was to be switched on to the sidetrack? *A.* No.

"(2) Was there a want of ordinary care on the part of defendant's employees in operating the train at the time of the injury which proximately contributed to the injury and death of Christ Hanson? *A.* Yes.

"(3) Was there a want of ordinary care on the part of Christ Hanson which proximately contributed to his injury and death? *A.* Yes.

"(4) If you answer both the second and third questions 'Yes,' then answer this question: Was the want of ordinary care of the servants of the defendant greater than the want of ordinary care of Christ Hanson? *A.* Yes.

"(5) If you answer both the second and third questions 'Yes,' then answer this question: Did the want of ordinary care on the part of the servants of the defendant contribute in a greater degree to produce the injury and death of said Christ Hanson than the want of ordinary care of said Christ Hanson? *A.* Yes.

"(6) If the court shall be of the opinion that the plaintiff is entitled to recover, at what sum do you assess plaintiff's damages? *A.* Four thousand and five hundred dollars ($4,500)."

Judgment for the plaintiff being entered on this verdict, the defendant appeals.

For the appellant there were briefs by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Killilea.*

For the respondent there were briefs by *Julius P. Frank* and *William F. Schanen,* attorneys, and *James D. Shaw,* of counsel, and oral argument by *Mr. Shaw.*

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The following opinion was filed March 17, 1914:

WINSLOW, C. J. Upon the argument in this court the objection was for the first time made that the case was one within the federal act, *i. e.* that the death of the testator occurred while he was employed in interstate commerce, and hence that the trial of the case under the provisions of the state law was a mistrial, and the judgment must in any event be reversed. This is the identical question raised and disposed of in the case of *Leora v. M., St. P. & S. S. M. R. Co.* 156 Wis. 386, 146 N. W. 520. Under the principles stated in that case it must be held here that the objection has been waived by reason of the fact that it was not raised in the trial court. We do not, therefore, consider the question whether the death of the testator occurred while he was employed in interstate commerce or not.

The appellant's chief contention on the merits is that there was no proof of negligence on the part of the defendant or its agents who were operating the train. We find this claim untenable. A rule of the company is as follows: "Flying switches are forbidden except at spur sidings." It is true that there was evidence from a number of witnesses that the movement made in the present case, though formerly called a flying switch, was no longer called a flying switch but a drop switch. There was, on the other hand, competent and credible evidence from at least one expert witness that the movement made in this case was in fact a flying switch. Examination of adjudicated cases will show that any movement of the train in switching whereby, when the train is in motion, a part of it is cut off, increased speed given to the engine, the detached cars also kept in motion and following the engine at a less speed and allowed to run on to a switch track, has been understood to be a flying switch. *Magner v. Truesdale,* 53 Minn. 436, 55 N. W. 607; 3 Words & Phrases, 2853.

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There is indeed a more complicated flying switch movement which occurs when there is a second detached part of the train kept in still slower motion following the cars to be switched, and this is said by the defendant's witnesses to be the only train movement which is now called a flying switch. However, there was sufficient evidence to sustain a finding that the train movement in the present instance was a flying switch within the meaning of the rule. If it was, then it was a prohibited movement, and the fact that it was made amply supports a finding of negligence on the part of the conductor or engineer, who was responsible for its being made. That there was ample room to find that this negligent movement of the train proximately contributed to the death of Hanson cannot be questioned.

The jury found, in substance, that the deceased was guilty of contributory negligence, but that the negligence of the defendant's agents was greater and contributed in a greater degree to produce the accident than the negligence of Hanson. The question as to whose negligence contributed in greater degree to produce the injury is peculiarly a jury question, and we cannot say that the finding of the jury thereon is against the evidence.

There is but one further contention which requires notice. It appears that in opening the case to the jury plaintiff's counsel stated, as one of the facts which they intended to prove, that Hanson was sitting down on the rear of the fifth car and when the train slacked up pulled the pin, and that the train was then jerked forward violently and he fell to the ground. When the evidence came in on the trial, the brakeman Lake, who in fact pulled the pin on car number 4, testified that he saw the deceased apparently reaching to pull the pin on car number 5, but that it was not in fact pulled. Another witness who was peeling ties just east of the track and about 100 feet south of the place of the accident, testified that he saw deceased sitting on the rear end of car number 5 with

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his back to the engine, his feet hanging down, and his left hand holding the brakestaff, when the jerk came and he fell off.

After this testimony came in plaintiff's counsel adopted the theory that deceased did not try to pull the pin, and defendant's counsel became anxious, on the other hand, to convince the jury that at the time of the accident the deceased was attempting to pull the pin, thus making himself a volunteer. Just as the evidence closed the defendant offered the opening statement aforesaid in evidence as an admission on the part of the plaintiff. Plaintiff's counsel said he had no objection to its appearing on the record that he made that statement to the jury, and the court ordered that the record should show that the statement was made just as claimed, but that the objection to it as evidence was sustained. It further appears that in his argument to the jury defendant's counsel commented on the statement so made a part of the record.

It is impossible to see how the defendant has suffered any prejudice even if it were to be conceded that the statement should have been formally received in evidence, a matter not necessary to be decided. Plaintiff's counsel frankly admitted that he made the statement, and defendant had the benefit of that admission just as fully as he would have had it had the statement been ordered to be received in evidence.

We find no prejudicial error in the record.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

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WILL OF HYDE: HYDE, Executor, Appellant.

February 25—June 17, 1914.

Executors and administrators: Accounting: Attorneys' fees: Objections: Appeal from county court: Who may appeal: Dismissal: Prejudicial error.

1. H., one of the executors of a will, was also one of the residuary legatees. His co-executor alone prepared and filed what purported to be the final account of the executors. The residuary legatees filed objections to and contested the allowance of certain items, and from the judgment allowing them H. appealed as executor. *Held*, that he was not precluded from appealing in that capacity on the ground that as executor he had asserted the correctness of the account and had objected to it only as residuary legatee. His intention being manifest, the formal objections filed by him as such legatee might, if necessary, be treated as having been made by him as executor also.
2. One executor may, without the consent or participation of his co-executor, appeal from an order or judgment of the county court which in his judgment does injustice to a residuary legatee.
3. Where items in an executors' final account for attorneys' fees upon a contest of the will in different courts were objected to in the county court and an appeal taken by one of the executors from their allowance, the dismissal of such appeal was not a mere technical error, the appellant being entitled to a hearing in the circuit court as to the reasonableness of the charges and as to the power of the county court to fix the amount and authorize payment of fees for services in other courts.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Reversed.*

W. P. Hyde and T. F. Powers were named as executors in the will of Thomas Hyde, deceased. There was a contest over the submission of the will to probate which was carried to this court. The case is reported in volume 141 of our Reports on page 41 (122 N. W. 774). The contest on the will was not sustained. Attorneys Veeder & Veeder appeared in the county and circuit courts and in this court in support of the will. They claim they were representing the executors as well as the proponent of the will, and their claim in this regard was sustained by the county court in the proceeding here

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involved. The appellant contended that they represented one Hannah Donovan only, the proponent of the will. What purported to be a final account of the executors was prepared and filed in the county court. It was verified by Powers, but not by his co-executor, *Hyde*. Among other items in the account, under the heading "Expenses of proponent in will contest," was one for $550 attorneys' fees for Veeder & Veeder for services rendered in the contest of the will in the courts in which it had been carried on. The executor, *W. P. Hyde*, and one T. F. Hyde were the residuary legatees named in the will. An objection was filed to the allowance of the account which contained the following recital:

"Now comes *W. P. Hyde* and Thomas F. Hyde, residuary legatees under the will of Thomas J. Hyde, deceased, by Lenicheck, Fairchild & Boesel and Daniel H. Grady, their attorneys, and object to the allowance of the following items in the final account herein presented and filed and verified by Thomas F. Powers, one of the executors of the said will. Said residuary legatees, *W. P. Hyde* and Thomas F. Hyde, object . . ."

Then follows a specific objection to the item of attorneys' fees referred to, as well as to some disbursements incurred in connection with the appeal to this court. The objectors prayed that these items be disallowed, and the objection was signed by the appellant's attorneys in this court as "Attorneys for *W. P. Hyde* and Thomas F. Hyde." The county court entered judgment allowing the final account and an appeal was taken from such judgment to the circuit court by *W. P. Hyde* as executor. Respondents moved to dismiss the appeal in the circuit court and this motion was granted, and from a judgment dismissing such appeal this appeal is taken.

For the appellant there was a brief by *Lenicheck, Robinson, Fairchild & Boesel* and *Daniel H. Grady*, and oral argument by *W. H. Farnsworth*.

For the respondent there was a brief by *Veeder & Veeder*, and oral argument by *C. A. Veeder*.

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The following opinion was filed March 17, 1914:

BARNES, J. The circuit court held, in substance, that the final account filed was the account of both executors, that *W. P. Hyde* did not object to it as executor, but in the capacity of residuary legatee only, and that, having in effect asked the court as executor to allow the account, he had no such interest in this capacity as would entitle him to appeal from the order and judgment of the county court allowing the account. The respondent takes the same position in this court, and in addition urges that the judgment of the county court was right on the merits and that the appellant was not injured by the dismissal of the appeal.

It is not necessary to decide whether an executor who presents and has allowed his final account can appeal from the order or judgment allowing the same entered at his request. It would be very farfetched to say that the executor, *W. P. Hyde,* did anything of the kind. He did not participate in the preparation of the account; it was not signed nor verified by him; and the verification by the co-executor does not state that it was made in behalf of both executors. *Hyde* apparently took very little part in the administration of the estate. He was in the office of Veeder & Veeder a couple of times. The first time he apparently wanted some other attorney to represent him. The next time he examined the account and thought or guessed it was all right. But on the date fixed for the hearing on the account he was in court with an attorney representing himself and T. F. Hyde as residuary legatees and made a sharp contest on the account, and a large amount of testimony was taken on the objections filed. It can hardly be said on these facts that he was asserting the correctness of the account in his capacity as executor and objecting to it in his character as residuary legatee. If it were necessary for him to file formal objections to the account as executor, the objections filed might well be treated as having

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been made in such capacity as well as that of residuary legatee. It would be very technical to hold otherwise. There can be no question about the intention of *Mr. Hyde* in the matter.

Neither is there any doubt about the right of an executor to appeal from an order or judgment of the county court which in his judgment does injustice to a residuary legatee. Sec. 4031, Stats.; *McKenney v. Minahan,* 119 Wis. 651, 654, 97 N. W. 489; *Cowan v. Beans,* 155 Wis. 417, 144 N. W. 1129. Nor is there any doubt about the right of *Hyde* to appeal as executor without the consent or participation of his co-executor. *Luscombe's Will,* 109 Wis. 186, 196, 85 N. W. 341. It follows from what has been said that the appeal was properly taken.

The respondent insists, however, that the decision of the county court was manifestly correct and that therefore the appellant was not prejudiced by the judgment dismissing the appeal, the error being technical and affecting no substantial right.

It would be carrying the rule by which we refuse to reverse except for prejudicial error beyond all reasonable bounds to apply it here. There was a sharp contest in the county court on the reasonableness of the attorneys' fees charged for services in the different courts. The appellant is contending that since ch. 397, Laws of 1901 (sec. 4041*a*, Supp. 1906), was amended by ch. 231, Laws of 1909 (sec. 4041*b*, Stats. 1913), the county court has no power to fix the amount of attorneys' fees recoverable on a will contest in the circuit court and that it never had the power to fix the amount that should be paid on such a contest in this court. It does not appear whether or not the executors had actually paid for the services rendered by the attorneys. We think the appellant is entitled to a hearing in the circuit court on the reasonableness of the charges. If the fees for services in the circuit and supreme courts have not been paid, then the appellant has the

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right to be heard on the power of the county court to fix the amount of such fees and to order them paid. If the attorney fee in these courts has been paid, then the appellant has the right to have the circuit court determine whether the executors were properly authorized to make the payment.

By the Court.—The judgment appealed from is reversed, and the cause is remanded for further proceedings according to law.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

RIPON HARDWARE COMPANY, Respondent, vs. HAAS, imp., Appellant.

February 26—June 17, 1914.

Married women: Conveyance by husband to wife: Fraudulent intent a question of fact.

1. As to a conveyance from husband to wife made after the enactment of ch. 86, Laws of 1895 (which by amendment to sec. 2342, R. S. 1878, removed a wife's disability to take real estate by gift or grant from her husband and provided that any such conveyance should be "valid to the same extent as between other persons"), the question of fraud is, under sec. 2323, Stats., one of fact and not one of law. Anything said to the contrary in *Oppenheimer v. Collins*, 115 Wis. 283, is overruled.
2. Earlier decisions of this court, made before said amendment, are inapplicable to such a conveyance, except in so far as they hold that transactions of that nature should be closely scrutinized because of the great inducement and facilities afforded for the commission of fraud.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This is an appeal by the defendant *Theresa Haas* from a judgment rendered upon the pleadings and admitted facts in an action brought by a creditor of John Haas, deceased hus-

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band of defendant *Theresa Haas,* in which the complaint prays that the conveyances made by John Haas during his lifetime of real estate to his wife be set aside and declared void as being made in fraud of plaintiff and other creditors. The answer admits the conveyances without valuable considerations, and denies the fraud.

The complaint shows that action was commenced against John Haas on the 24th day of August, 1907, upon a claim existing at the time the conveyances hereinafter mentioned were made; that pending the action he died and the action was revived against his estate and went to judgment, was afterwards certified and filed in the county court, and remained unpaid; that the inventory filed in the county court showed property worth $1,500; that claims were allowed against the estate to the amount of $425, exclusive of the claim of the plaintiff, who was the only judgment creditor of the deceased, John Haas; that the estate has not been settled; that there is reason to believe that the estate of said Haas as set forth in the inventory returned to the county court is not sufficient to pay the debts of said Haas, which amount to $2,400; that at the time said Haas incurred the liability upon which said judgment of plaintiff is founded, to wit, August 22, 1901, said Haas was the owner, free from incumbrances, of real estate in Fond du Lac county; that on May 6, 1902, said Haas, with intent to defraud his creditors, conveyed certain of his real estate for a consideration recited therein of $1,000 to his wife, the defendant *Theresa Haas;* that said real estate was worth $12,000; that subsequent to the contracting of said indebtedness and obligation said John Haas on May 6, 1902, for a consideration of $1,000 named in the deed, conveyed to his wife, *Theresa Haas,* other real estate owned by him worth $12,000 or more; that on May 6, 1902, for a consideration named in the deed of $500, said John Haas conveyed to his wife other land owned by him, which land was worth $9,000; that on October 29, 1902, for

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a consideration of $4,000 named in the deed, said Haas conveyed to his wife, *Theresa Haas,* other real estate owned by him which was worth $7,000; that on May 6, 1902, for a consideration of $500 named in the deed, said John Haas conveyed to his wife other real estate worth $5,000; that on May 6, 1902, for a consideration named in the deed of $500, said John Haas conveyed to his wife, *Theresa Haas,* other real estate of the value of $6,000; that all the foregoing conveyances were duly recorded in the office of the register of deeds of the proper county. It is also stated in the complaint that no valuable consideration passed, and that all the conveyances to said defendant *Theresa Haas* were gifts to her as wife of said John Haas, and that the action is brought on behalf of the plaintiff and other creditors. It is also alleged that the defendant C. J. Haas is administrator and sole heir of John Haas, deceased.

The stipulated facts above referred to are that at the time Haas signed the guaranty in August, 1901, upon which judgment was entered, he was worth about $100,000. In May, 1902, he deeded $44,000 worth of property to his wife. In August, 1902, he executed five deeds to his son, who was his sole prospective heir at law. A few days later he executed to his wife other conveyances attacked in the complaint, bringing the total value of property conveyed to her up to $51,000. The note upon which the judgment was based was at this time past due and unpaid, although Mr. Haas, under the statement made, never had the nonpayment called to his attention. It would appear that at this time, August, 1902, the deceased divided all his realty, and presumably all his property, between his wife and son, except the $1,500 worth inventoried, which probably was not conveyed to either because not called to mind at the time. Judgment was entered ordering that the conveyance of May 6, 1902, conveying real estate, in consideration of $500, which was worth $6,000, be set aside unless the defendant *Theresa Haas* within sixty days

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paid to the plaintiff $1,959.90, with interest and costs, and granting other relief.

For the appellant there was a brief by *Morse & Chadbourne,* attorneys, and *Thompson, Thompson & Jackson,* of counsel, and oral argument by *F. W. Chadbourne* and *J. C. Thompson.*

For the respondent there was a brief by *Carter & Pedrick,* and oral argument by *S. M. Pedrick.*

The following opinion was filed March 17, 1914:

KERWIN, J. The question involved in this case is whether, under the statutes of this state and decisions of this court, a gift to a married woman by her husband of real estate is void as to existing creditors, regardless of the amount of the gift, solvency of the donor, or intention on the part of the donor or donee to defraud. The question is squarely raised here because judgment was rendered on the pleadings and certain admitted facts.

Before the passage of ch. 86, Laws of 1895, it was settled by the decisions of this court that a deed of real estate by a married man to his wife, not based upon any consideration except love and affection, was void as to existing creditors. This rule has been consistently followed by this court from *Stanton v. Kirsch,* 6 Wis. 338, down to *Horton v. Dewey,* 53 Wis. 410, 10 N. W. 599, where the rule is thus stated:

"This court has repeatedly held that, in a contest between the creditors of a husband and the wife, if the wife claims ownership of the property by a purchase, the burden of proof is upon her to prove, by clear and satisfactory evidence, such purchase, and that the purchase was for a valuable consideration, paid by her out of her separate estate, or by some other person for her." . . . "In all such cases the burden of proof showing the *bona fides* of the purchase is upon her, and she must show by clear and satisfactory evidence that the purchase was made in good faith with her separate estate, or for a consideration moving from some person other than her hus-

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band. In all such cases the presumptions are in favor of the creditors, and not in favor of the title of the wife."

A different rule obtained where the gift was made in good faith before the indebtedness was incurred. *Wheeler & W. M. Co. v. Monahan,* 63 Wis. 198, 23 N. W. 127; *Le Saulnier v. Loew,* 53 Wis. 207, 10 N. W. 145. As the law stood up to the amendment of the statute, ch. 86, Laws of 1895, a deed from a husband to his wife of real estate was void because the wife could not take by gift or grant from her husband. But this disability was removed in 1895 by the amendment to the statute referred to, which left the law on the subject as it appears in sec. 2342, Stats., and which permits a married woman to receive by inheritance or by gift, grant, devise, or bequest from any person, which of course includes her husband. And this statute further provides: "Any conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons." This statute is broad and sweeping. It not only removes the disability formerly existing and allows married women to take by gift or grant from their husbands, but with regard to a conveyance, transfer, or lien executed by the husband to the wife makes the same valid to the same extent as between other persons.

Sec. 2323, Stats., provides: "The question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact and not of law, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

The foregoing statute had little if any bearing before 1895 so far as conveyances from husband to wife were concerned, because the wife had no rights which she could legally enforce as against existing creditors. Equity, however, would in a proper case protect her rights where she had a separate estate and showed that she paid a full consideration for the property from her separate estate and that there was no intent to de-

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fraud creditors. But under the law since the amendment of 1895 the early decisions of this court respecting conveyances from husband to wife have little bearing except so far as they hold that such transactions should be closely scrutinized on account of the great inducement and facilities afforded for the commission of fraud. *Wallace v. Pereles,* 109 Wis. 316, 85 N. W. 371. No reason is perceived why a wife should not under existing law stand in the same position as regards a conveyance from her husband as a son in regard to a conveyance from his father. We think it clear, therefore, that the obvious intention of the legislature by the amendment of 1895 was to make the question of fraud in a conveyance from husband to wife one of fact and not of law. Sec. 2323, Stats.; *Hyde v. Chapman,* 33 Wis. 391. True, cases may arise when the facts proved are such that the law conclusively presumes an intent to defraud. *Barkow v. Sanger,* 47 Wis. 500, 3 N. W. 16; *Trowbridge v. Sickler,* 54 Wis. 306, 11 N. W. 581; *St. Louis C. P. Co. v. Christopher,* 152 Wis. 603, 140 N. W. 351. But these cases are consistent with the general doctrine that the question of fraud is generally one of fact. At the time the conveyances were made to the wife in the instant case, the statute placed the wife upon the same legal basis as any other person, and so the early decisions, when the wife labored under disability, do not apply.

In the case of *A. D. Baker Co. v. Booher,* 153 Wis. 319, 141 N. W. 248, in a contest between creditors of a deceased father against sons who had received gifts from their father, it was held that if sufficient property was retained by the father, providently applied, to pay existing creditors the conveyances would be upheld. We are convinced that upon the facts of this case as shown by the pleadings and stipulation, construed in the light of ch. 86, Laws of 1895, the plaintiff was not entitled to judgment setting aside any conveyance to the defendant *Theresa Haas.* It seems from the decision of the learned trial judge, in the record, that he was of opinion that ch. 86, Laws of 1895, was not intended to have any effect

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other than to remove the disability of the wife as to receiving title directly from her husband. We cannot think that the act should be so limited. If so, then the only change necessary was the first part dropping out of the former statute the words "other than her husband." But the legislature did not stop there, but added the further provision to the effect that the transfer to the wife direct from the husband "shall be valid to the same extent as between other persons." If the object of the law was to remove the disability as to receiving title merely, the latter part of the act would have been unnecessary.

Under the early decisions and our statutes prior to 1895, conveyances to the wife from the husband were not valid to the same extent as conveyances to others, and we believe it was the legislative policy, as indicated by the act, to change the rule. *Kriz v. Peege,* 119 Wis. 105, 95 N. W. 108; *Citizens L. & T. Co. v. Witte,* 116 Wis. 60, 92 N. W. 443.

Counsel on both sides have favored us with very able briefs, which have received careful consideration, but we have not deemed it necessary to refer to all the cases cited to our attention. We desire, however, to refer to *Oppenheimer v. Collins,* 115 Wis. 283, 91 N. W. 690, which was decided after ch. 86, Laws of 1895, was passed, and which is relied upon by counsel for respondent. It would seem that the attention of the court was not sharply drawn to the effect of ch. 86 in considering that case. However, we cannot regard it as controlling, and anything said in it contrary to the conclusions here reached must be regarded as overruled. We have arrived at the conclusion that judgment should not have been ordered upon the pleadings and admitted facts.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

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KOWALKOWSKI, Respondent, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Appellant.

March 20—June 17, 1914.

Street railways: Injury to person driving along track: Contributory negligence: Question for jury.

1. Ordinary care requires a person about to cross or drive upon a street railway track to look in both directions and listen for approaching cars at a point where it is reasonably certain that such efforts will accomplish their purpose, his duty in this regard being identical with that of a person approaching the track of a steam railway.
2. It is the duty of a person traveling along a street railway track to give way in due season to an approaching car, whether coming from the front or the rear, and to exercise ordinary care not only to discover when a car is approaching but to turn off from the track in time to prevent a collision.
3. The question of ordinary care is generally a relative question, depending upon the facts surrounding each case.
4. On a dark winter evening, at a time when the track was clear in both directions, plaintiff, with a single horse and a wagon loaded with coal, drove upon and proceeded along defendant's street railway track. He looked back about every half block, but saw no car coming until the last time. Then, seeing a car approaching from behind, he attempted to turn off from the track upon the rough unpaved highway, but the rear wheel of his wagon was struck and he was injured. The car had no headlight except a sixteen candle-power incandescent light with a reflector on the roof, and the night was gloomy, with snow flurries. There was evidence that the car was behind time and was running twenty miles or more per hour, that its gong was not rung or its speed slackened as it approached plaintiff's wagon, and that no attempt was made to stop it until after the collision. *Held*, that plaintiff was not guilty of contributory negligence as matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: BYRON B. PARK, Judge. *Affirmed.*

Action for personal injuries. The plaintiff, while driving a single horse and wagon westward on Atkinson avenue in the city of Milwaukee on the evening of January 13, 1912, at a

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few minutes before 6 o'clock, was run into from the rear by one of the defendant's urban street cars, thrown from his wagon, and seriously injured. The plaintiff had a ton of coal in his wagon which he had procured at the so-called Gibson station on the Port Washington road, and was taking the same to his house on the corner of Nineteenth street and Atkinson avenue. He came from the north and reached Atkinson avenue on Eleventh street, which crosses Atkinson avenue nearly at right angles. Plaintiff testifies that he stopped before turning westward on Atkinson avenue because he saw a car to the westward "at the loop on Twentieth and Atkinson avenue" coming eastward, and that he remained there until this car, which was an interurban car, passed him and went eastward; that after this car passed he turned westward on Atkinson avenue and drove on to the street-car track, which at this point is a single track; that the night was cold, the highway unpaved, and the street so rough that it was difficult for his horse to obtain a footing anywhere except on the street-car track; that for this reason he continued to travel westward upon the street-car track; that he looked back from time to time to see whether any car was approaching from the rear; that he looked back at about Twelfth street and again at a point about half way between Twelfth and Thirteenth streets and saw no car; that he looked back at about Thirteenth street and saw a car, which, however, turned off towards Lindwurm Park before reaching him; that he looked back between Thirteenth and Fourteenth streets and saw no car; that as he reached Fourteenth street he looked around for his whip and saw a car coming; that he hollered all he could and turned his horse to the left, but was unable to get clear of the track, and the car struck the rear wheel of the wagon, wrecking it and throwing the plaintiff to the ground. It appears that both urban and interurban cars operate over the piece of track in question, the interurban cars being larger and carrying an arc headlight on the front dashboard,

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while the urban cars carry only a sixteen candle-power incandescent light "over the first roof of the car, pretty well to the front," with a parabolic reflector; that the car in question was one of the urban cars. The motorman claims that he first saw plaintiff's wagon when the car was from 60 to 100 feet distant; that he sounded the gong, reversed the current, and threw sand on the rail, but that the rail was slippery and the car could not be stopped in time and struck the right wheel of the wagon as it was on the south track. Plaintiff's witnesses estimated the speed of the car at from eighteen to twenty-five miles an hour, while defendant's witnesses estimated it at about ten miles an hour. The plaintiff testified that he heard no gong sounded, and one of the passengers on the car testified that the gong was not sounded. The car ran some distance after the crash, the estimates of the witnesses varying from 100 feet to nearly a block.

The jury returned a special verdict to the effect (1) that the defendant negligently operated the car; (2) that such negligence was the proximate cause of plaintiff's injury; (3) that no want of ordinary care on plaintiff's part proximately contributed to the injury; and (4) that plaintiff's damages were $8,000. From judgment for the plaintiff on this verdict the defendant appeals.

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *James G. Flanders.*

For the respondent there was a brief by *O'Connor, Schmitz, Wild & Gross,* and oral argument by *A. J. Schmitz* and *E. J. Gross.*

The following opinion was filed April 9, 1914:

WINSLOW, C. J. The appellant's case is based on the proposition that the evidence shows contributory negligence on the part of the plaintiff as matter of law, and to this proposition we direct our attention.

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The law is well settled in this state that ordinary care requires a person about to cross or drive on to a street railway track to look in both directions and listen for approaching cars at a point where it is reasonably certain that such efforts will accomplish their purpose. In this respect the duty of the traveler approaching a street railway track is identical with the duty of the traveler approaching the track of a steam railway. *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823; *Cawley v. La Crosse City R. Co.* 106 Wis. 239, 82 N. W. 197; *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 119 N. W. 833. When, however, the question arises as to the duty of a person traveling upon the street lengthwise of the street railway track, it is plain that there can be no very close analogy between steam railroads operating cars upon their own right of way and street railroads operating cars upon the public street. The difference of situation necessarily creates different standards of conduct. The traveler has no right to travel upon the inclosed right of way, but he has a right to travel upon that part of the highway covered by the street railway track when it is not required for the passage of street cars in the performance of that duty which street-car companies assume to the public. From the very nature of the situation the citizen must defer to the street car when using this part of the public street. The street car is of great size, must travel at a considerable speed to perform its duties as a common carrier under modern conditions, necessarily acquires great momentum, cannot be momentarily stopped, and cannot turn out. The deference required of the traveler is not so much deference to the street-car company as it is deference by one citizen to that very large number of his fellow-citizens who are being constantly transported by street cars, who cannot themselves control the movements of the cars, and whose right to speedy and safe transportation upon the vehicles of a common carrier must naturally be held to be paramount. *Watermolen v.*

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Fox River E. R. & P. Co. 110 Wis. 153, 85 N. W. 663. So it is manifestly the duty of the traveler who chooses to travel along that part of the street occupied by the street railway track to give way in due season to an approaching car, whether approaching from the front or the rear, and it follows necessarily that it is his duty to exercise ordinary care not only to discover when a car is approaching, but to turn off from the track in time to prevent a collision. The question here is whether the evidence conclusively shows that the plaintiff failed to exercise this degree of care at the time of the accident, and this question is a reasonably close one. The question of ordinary care is generally a relative question, depending upon the facts surrounding each case. For this reason the citation of adjudicated cases is not very helpful, as there is always a difference in the facts. There is nothing in the present case to indicate that the plaintiff was negligent in going on to the track in the first instance. If his testimony is to be believed, and there is nothing to shake it on this point, he waited until a car from the west passed him and went eastward, so that the track was clear in both directions before he ventured on the track. The night was dark, the highway (except where the track was laid) so rough as to make traveling hard, if not positively dangerous. Naturally he chose the part covered by the track and proceeded westward. It was his duty unquestionably to make frequent observation to the rear to see whether a car was following him. The blocks on Atkinson avenue were about 350 feet long. The plaintiff claims that he looked back about every half block from Twelfth to Fourteenth streets, and saw no car coming until his last observation. Had it been daylight at the time, this evidence would unquestionably have to be rejected as incredible, for the track was clear and no sufficient difference existed in the grade of the track to affect the ability to see a car approaching from the rear. It is contended that the same conclusion must be reached notwithstanding the fact that it

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was dark, because it is said that the plaintiff must have seen the headlight of the car which struck him and which had turned on to Atkinson avenue at Sixth street. Had this car borne an arc headlight on the dashboard, such as the interurban cars bore, this contention would be very difficult, if not impossible, to meet. It bore, however, only a sixteen candle-power incandescent light with a reflector on the forward part of the roof. It may well be that this comparatively feeble light in the position in which it was would not necessarily attract the attention of a man taking occasional glances backward, or if seen would not be identified as the light of an approaching car. The motorman testified that the night was gloomy, that there had been snow flurries during the day and were snow flurries that night. If the plaintiff's testimony is to be believed, he saw the car the last time he looked around and immediately proceeded to turn his horse to the left into the highway proper. This must under all the circumstances have been a slow operation. The wagon contained a ton of coal beside the driver and the horse was compelled to make his way into and over a rough and hummocky country road. The movement had been so far accomplished that the car struck only the last wheel of the wagon as it was clearing the south track. The time taken in this operation must have been considerable. It seems to demonstrate that the car (if moving at anywhere near the rate testified to by the plaintiff's witnesses) must have been a considerable distance away when the plaintiff looked around and saw it approaching. It appeared by the evidence of the motorman that the car was about ten minutes behind time. While the motorman denied that he was attempting to make up time, there was sufficient evidence to justify the jury in concluding that the car was going at a speed of twenty miles or more an hour at the time, that the gong was not rung nor the speed slackened as the car approached the plaintiff's wagon,—in fact that no attempt was made to stop it until the wagon had been struck.

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Of course, the failure of the motorman to perform his duty does not excuse a traveler from failure to perform his duty, *i. e.* to exercise ordinary care. However, the fact that signals are required to be given and normally are given as a car approaches from the rear is a fact which is entitled to be considered when the mind is endeavoring to determine what the ordinary man would do under the circumstances which surrounded the plaintiff. In other words, it is one of the circumstances.

In view of all the facts, and especially in view of the conclusion reached by the trial judge to the effect that there was sufficient evidence to support the jury's findings, we feel that we cannot say, as matter of law, that the plaintiff failed to exercise ordinary care.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

SMITH, Respondent, vs. LEDERER, Appellant, and anotner, Respondent.

March 20—June 17, 1914.

Landlord and tenant: Negligence: Defective elevator: Injury to invitee: Duty and liability of tenant: Master and servant: Casual service: Appeal: Disposition of case.

1. Where one of several tenants of a building employed plaintiff to perform a casual service, impliedly inviting him to use in performing it the elevator furnished by the landlord for the common use of all of said tenants, the relation of master and servant did not exist between such tenant and the plaintiff in respect to the elevator, nor the relation of carrier and passenger, but that of invitor and invitee, and the duty which the tenant owed to plaintiff was that of ordinary care only.
2. Where, in such case, the landlord had agreed or assumed to keep the elevator in repair, ordinary care on the part of the tenant

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toward his invitee did not include the duty to make an expert examination of the machinery for the purpose of discovering defects therein, but he might rely on the obligation of the landlord to perform that duty in the absence of a known breach of such obligation or notice of facts sufficient to put him upon inquiry.

3. Where such tenant, shortly before the injury complained of, notified the landlord that the elevator was out of repair, and the latter sent a man to repair it, and afterward the tenant's agent looked for and found evidences that repairs had been made, operated it, and from the manner in which it worked concluded that suitable repairs had been made, the tenant was not liable for an injury suffered by plaintiff in the use of such elevator by reason of the insufficiency of such repairs.

4. Ordinary care would require the tenant to warn his casual employee of any danger of which he knew, or ought to have known, but the duty to keep the elevator in a reasonably safe condition did not rest upon him.

5. In an action against L. and D. for personal injuries, the special verdict exonerated L. but found D. guilty of negligence. Because of a supposed error in the charge respecting the liability of L., an order granting a new trial was made upon plaintiff's motion and also, in form, upon the motion of D., but in fact all questions raised by D. were decided against him. Upon an appeal by L., D. appeared as a respondent. It appearing that the charge was correct, the order for a new trial is reversed and judgment on the verdict directed in favor of L. against plaintiff and in favor of plaintiff against D.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action for a personal injury. The evidence, as to the issues raised by the pleadings, is to this effect: Plaintiff, a drayman, was employed by defendant *Lederer* to convey a load of wall paper, from the latter's store room on the third floor of a building, to his retail place, a short distance away. The building was possessed by the Acme Ground Rent Company, of which defendant *John DeWolf* was president. *Lederer* was a tenant as to the store room. *DeWolf,* in general, looked after the building. There were several tenants therein, each having a particular part thereof. It was equipped with a hand elevator which the tenants were permitted to use

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at their convenience. The elevator was furnished by the Acme Ground Rent Company as landlord, no one of the tenants having anything to do with keeping it in repair. Each who used the elevator was his own operator. It was used by such persons as the tenants respectively employed to perform services for them. In each case the person so invited operated the elevator. On the occasion in question, plaintiff, as was customary, operated the elevator in conveying paper from the store room to the ground floor. A regular employee of *Lederer* assisted plaintiff. *DeWolf,* as president of his company, employed one Wilke as superintendent. His duty required him to look after the particular and other buildings owned by the corporation and let to tenants. It included looking after repair of buildings, hiring and supervising subordinate employees in and about the same. While plaintiff was engaged in placing paper on the elevator platform at the third floor, it fell, carrying him down and seriously injuring him. The accident was caused by such loosening of the key which fastened the elevator drum to the drum shaft, that it was wholly inefficient for that purpose, allowing the cable to which the elevator platform was attached to unwind and the car to drop. The drum was located in and above the ceiling over the third floor and so environed that inspection thereof required one in doing that to climb over the elevator frame and into the vicinity of the operating machinery. Defendant *Lederer's* employee notified *DeWolf's* office some time before the accident that the appliance was out of order. A short time thereafter *DeWolf* caused some repairs to be made. The machine then operated properly. Between that time and the accident several days elapsed during which the appliance was often used without disclosing any defect and without *Lederer* having any notice that it was not safe, or any way of discovering the true situation, except by climbing up to the drum and making an expert inspection. Neither he nor any of his employees did that, nor any one else to his

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knowledge. None of the tenants assumed any such duty. They depended on the landlord to keep the appliance in proper condition. The day before the accident the elevator was subjected to a pretty severe strain by moving a drill press weighing 1,000 pounds or more, but *Lederer* had no notice thereof before the accident.

The jury found, among other things, as follows: The proximate cause of the injury was a defect in the elevator drum. *DeWolf,* as president of his company, took the responsibility of keeping the elevator in repair. The defect which caused the accident was discoverable by the exercise of ordinary care in time to have remedied it before the accident. *DeWolf* had notice that the elevator was out of repair a short time before the accident and after the defect in the drum had developed so as to be discoverable by the exercise of ordinary care. He caused repairs to be made, but not so as to remedy the particular defect. There was no understanding with *Lederer* that he should repair the elevator. Plaintiff did not contribute to his injury by any want of ordinary care. *Lederer's* request of plaintiff to move the paper implied an invitation to use the elevator. Plaintiff was damaged to the extent of $5,000. In addition there were these two questions and answers: "Ought the defendant *Lederer,* in the exercise of ordinary care, to have discovered the defect in time to have remedied the same before the accident? *A.* No." "Was the failure of defendant *Lederer* to discover and remedy said defect a proximate cause of the injury to plaintiff? *A.* No."

Plaintiff moved the court for judgment against both defendants and for such changes in the findings as to warrant the same, and as an alternative moved for a new trial. Counsel for *Lederer* moved for judgment in his favor. Counsel for *DeWolf* moved for judgment notwithstanding the verdict, and in the alternative for a new trial. All motions were denied except those, on behalf of *DeWolf* and on

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the part of plaintiff, for a vacation of the verdict and for a new trial, which were granted for a supposed prejudicial error in giving the following instruction respecting the question as to *Lederer's* responsibility:

"In answering question 9 you are instructed that if you find that as between the defendant *Lederer* and the defendant *DeWolf, DeWolf,* as agent of the landlord, undertook and assumed the responsibility of keeping the elevator in proper repair, this undertaking included on his part the duty of making proper inspection from time to time to see that it was not out of repair, and the defendant *Lederer* had the right to assume that this duty was being performed by *Mr. DeWolf,* unless the contrary appeared without particular or technical inspection in the absence of obvious defects or knowledge of some fact or circumstance actually or constructively brought home to him, which would ordinarily put an ordinarily careful person on such inquiry as to lead to knowledge of a contrary condition existing."

In granting the new trial the court explained that, though plaintiff was a mere licensee of *Lederer,* the latter owed to the former an active duty to see that the elevator was in proper order,—a degree of care not satisfied by a mere casual inspection after the repair by *DeWolf.*

The appeal is by *Lederer* from the order denying him judgment on the verdict and the order granting a new trial.

A brief on behalf of *DeWolf* was filed. In that he appeared as a corespondent with plaintiff.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McNamara.* They argued, among other things, that when the defendant *DeWolf* undertook to maintain the elevator in repair the law imposed upon him the duty to use ordinary care to make all necessary repairs. *Wertheimer v. Saunders,* 95 Wis. 573, 70 N. W. 824; *Barron v. Liedloff,* 95 Minn. 474, 104 N. W. 289; *Good v. Von Hemert,* 114 Minn. 393, 131 N. W. 466; *Carlon v. City Sav. Bank,* 85 Neb. 659, 124 N. W.

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91; *Gill v. Middleton,* 105 Mass. 477, 7 Am. Rep. 548; *Myhre v. Schleuder,* 98 Minn. 234, 108 N. W. 276; 18 Am. & Eng. Ency. of Law (2d ed.) 239; 34 L. R. A. N. S. 806, note; *La Pray v. Lavoris C. Co.* 117 Minn. 152, 134 N. W. 313; *Baker v. Moeller,* 52 Wash. 605, 101 Pac. 231; *Grant v. Tomlinson,* 138 Mo. App. 222, 119 S. W. 1079; *Nash v. Webber,* 204 Mass. 419, 90 N. E. 872. The defendant *Lederer* had the right to assume that *DeWolf* had performed his duty, and was not required to make a technical inspection. *Gager v. Stolle-Barndt L. Co.* 149 Wis. 154, 157, 135 N. W. 490; *Greene v. Seattle A. Club,* 60 Wash. 300, 111 Pac. 157; *Schoppel v. Daly,* 112 La. 201, 36 South. 322, 325; 3 Shearm. & Redf. Neg. (6th ed.) § 724; *Eckman v. Atlantic Lodge,* 68 N. J. Law, 10, 52 Atl. 293; *Fox v. Buffalo Park,* 21 App. Div. 321, 47 N. Y. Supp. 788.

For the respondent *Smith* there were briefs by *O'Connor, Schmitz, Wild & Gross,* and oral argument by *A. J. Schmitz* and *E. J. Gross.* They contended, *inter alia,* that irrespective of whether or not it was the duty of *DeWolf* to make repairs on the elevator, and whatever his contractual relations with anybody else may have been, having once undertaken to repair the elevator he became liable for a failure to perform the work with reasonable skill and care. *Buldra v. Henin,* 212 Mass. 275, 98 N. E. 863; *Orcutt v. Century B. Co.* 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. N. S. 929; *Southern R. Co. v. Grizzle,* 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191; *Baird v. Shipman,* 132 Ill. 16, 23 N. E. 384; *Haynes's Adm'rs v. C., N. O. & T. P. R. Co.* 145 Ky. 209, 140 S. W. 176, 180; *Grifhahn v. Kreizer,* 171 N. Y. 661, 64 N. E. 1121; *Schlosser v. G. N. R. Co.* 20 N. Dak. 406, 127 N. W. 502; *Lough v. John Davis & Co.* 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802; 31 Cyc. 1560. The defendant *Lederer* owed the plaintiff the duty of providing a safe elevator for hauling the goods from the fourth floor of the warehouse, as well as the duty to inspect to determine its condition. This duty was owing whether or not the defendant *DeWolf* under-

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took to repair and whether or not there was any agreement between *DeWolf* and *Lederer* relative to who should keep the elevator in repair. *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Hasbrouck v. Armour & Co.* 139 Wis. 357, 364, 121 N. W. 157; *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800; *Carter v. R. & I. R. Co.* 147 Wis. 86, 132 N. W. 598; *Steppe v. Alter,* 48 La. Ann. 363, 19 South. 147, 55 Am. St. Rep. 281; *Foley v. J. R. Whipple Co.* 214 Mass. 499, 102 N. E. 84; *Cotant v. Boone S. R. Co.* 125 Iowa, 46, 99 N. W. 115, 69 L. R. A. 982; *McIntyre v. Detroit S. Co.* 129 Mich. 385, 89 N. W. 39; *McIntyre v. Pfaudler V. F. Co.* 133 Mich. 552, 95 N. W. 527; *McDermott v. Burke,* 256 Ill. 401, 100 N. E. 168.

Adolph Huebschmann, for the respondent *DeWolf,* to the point that the landlord is not liable for injuries to third persons during the tenancy, caused by the defective condition of the demised premises, and that this includes persons occupying or going upon the premises at the invitation or license or command of the tenant, such as members of his family, employees, guests, or customers of the tenant, cited *Fellows v. Gilhuber,* 82 Wis. 639, 52 N. W. 307; *Anderson v. Hayes,* 101 Wis. 538, 77 N. W. 891; *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 91 N. W. 994; *Cole v. McKey,* 66 Wis. 500, 29 N. W. 279; *Dowling v. Nuebling,* 97 Wis. 350, 72 N. W. 871; 18 Am. & Eng. Ency. of Law (2d ed.) 238; 34 L. R. A. 609 and note; 34 L. R. A. N. S. 808; 46 L. R. A. 83 and note; *Hutchinson v. Cummings,* 156 Mass. 329, 31 N. E. 127; *Marley v. Wheelwright,* 172 Mass. 530, 52 N. E. 1066; *McLean v. Fiske W. & W. Co.* 158 Mass. 472, 33 N. E. 499; *Freeman v. Hunnewell,* 163 Mass. 210, 39 N. E. 1012.

The following opinion was filed April 9, 1914:

MARSHALL, J. If a person who is a tenant of a portion of a building which is rented to several,—to each a particular portion,—employs another to perform a casual service for him, impliedly inviting that other, in performing such serv-

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ice, to use an elevator furnished by the landlord to the tenants for their common use and that of persons having occasion to visit or have to do with their respective holdings, the relations of master and servant do not exist between such person and such other in respect to such elevator nor the relation of carrier and passenger, but that of invitor and invitee.

In case of a person employing another to perform a service for him, which involves an invitation to visit premises of which he is a tenant with others and to use an appliance in the performance of such service, as in this case, he owes to such person the duty of ordinary care.

Where the appliance, in the circumstances stated, is furnished for the common use of several tenants, the landlord agreeing or assuming to keep it in repair, ordinary care on the part of the tenant does not include duty to make an expert examination of the machinery for the purpose of discovering defects, if there be any; he may rely on the obligation of the landlord to perform such duty, in the absence of a known breach of such obligation, or actual notice of want of repair or of facts sufficient to put one, so circumstanced, upon efficient inquiry.

The foregoing is in harmony with the instruction which the learned circuit court gave to the jury, which he later considered was efficiently misleading.

The exact thought which caused condemnation of the instruction does not clearly appear. The only expression of the trial judge which throws any light on the question, is the one to the effect that appellant *Lederer* owed to his invitee an active duty; that a casual inspection was not sufficient. The idea could not well have been, in using the term "casual inspection," the mere seeing of those things which would ordinarily come under one's observation by visiting the elevator and using it, because the evidence is pretty clear that something more was done. *Lederer's* agent looked for some evidence that repairs had been made to the elevator, and he op-

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erated it, noting its performance in comparison with that before he gave notice that the appliance was out of order. From the manner the machine worked he made up his mind that suitable repairs had been made. That was something more than a mere casual inspection, if more was required. The evidence shows the person who so passed judgment after the repair was competent therefor. What he did may well have been thought by the jury, such an inspection as a person of ordinary care would ordinarily make under the same or similar circumstances, though not answer to a "particular or technical inspection" as that term was used in the instruction. An inspection of such character would have required some one with competency of a reasonably skilled expert, to ascend to the region of the elevator machinery and examine for discoverable defects. The idea must have been that ordinary care, in the circumstances of *Lederer,* might or might not, in the judgment of the jury, require such an inspection. That was error.

The degree of care which devolved on *Lederer* was correctly given in the instruction. As suggested by counsel for appellant, the instruction was taken from *Gager v. Stolle-Barndt L. Co.* 149 Wis. 154, 135 N. W. 490. It was there given as an elementary principle. We affirm it. Otherwise every tenant in a building, equipped with an elevator, kept in repair by the proprietor for the common use of tenants, would be bound to exercise all the care of a proprietor in regard to the personal safety of any one using the appliance in serving him. By the same principle, if a person employed another to perform a casual service which involved a suggestion to engage a dray to convey freight from one place to another and accompany the drayman, such person would owe to such other the duty of making a careful technical inspection of the drayman's equipment before permitting such other to subject himself to danger of personal injury by reason of any infirmity therein. That might extend to unsuitableness of the team or even the driver. These illustrations,

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though somewhat extreme, are legitimate and show the absurdity of departing from the reasonable rule given in *Gager v. Stolle-Barndt L. Co., supra.*

The foregoing is in harmony with *Hasbrouck v. Armour & Co.* 139 Wis. 357, 364, 121 N. W. 157; *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800. Of course it was appellant's duty to warn respondent *Smith* of any danger of which he knew, or ought to have known, but that has reference to what one actually knows, or ought to have known, by the exercise of ordinary care under the same or similar circumstances. The rule as to duty to keep in a reasonably safe condition, given and applied in *Carter v. Rockford & I. R. Co.* 147 Wis. 86, 132 N. W. 598, does not extend to such a situation as that in hand.

DeWolf, as indicated in the statement, did not appeal. The new trial, in form, was granted on his motion as well as plaintiff's; but, in fact, all questions raised by him were decided against him. He is here, by a brief, as respondent; but his real adversary is the plaintiff, not appellant *Lederer.* If the verdict be wrong upon any ground urged in his behalf, no question in respect thereto entered into the decision appealed from, notwithstanding the form of the order. Therefore, it is considered judgment should be rendered as indicated in the mandate.

By the Court.—The order appealed from is reversed, and the cause remanded for judgment on the verdict in favor of defendant *Lederer* against the plaintiff with costs and in favor of plaintiff against defendant *DeWolf* for the amount found by the jury with costs. Costs are awarded in this court in appellant's favor against both respondents.

KERWIN, J., dissents.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

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YOUNGS, Respondent, vs. WEGNER, Appellant, and others, Respondents.

March 20—June 17, 1914.

Foreclosure of mortgage and of land contract: Continued possession by mortgagor or purchaser: Status and rights: Homestead: Alienation: Land contract as mortgage: Failure to raise question on trial: Waiver.

1. The continued possession by a mortgagor, or a purchaser under land contract, of the premises described in the mortgage or contract, after foreclosure and sale under the mortgage, or after foreclosure of the land contract and lapse of the time allowed for redemption, resolves itself into a tenancy which is in subordination to the rights of the owner claiming under such foreclosure.
2. Even if such mortgagor or purchaser, by remaining in possession and making payments after completed foreclosure, acquired a homestead right or interest in the premises, that in no way impaired the right of the legal owner to deal with the property as such, and he could make a valid transfer of his legal title and interest to a third person without the signature of the wife of such occupant, and such homestead right would be subordinate to the title so conveyed.
3. Such a transfer does not involve any alienation by the husband of the property or any interest therein to which the homestead right extends, within the meaning of sec. 2203, Stats.; neither does a contract for sale of the land by the grantee of such legal owner to the claimant of the homestead right; and upon default of the latter to make the payments stipulated in such contract the rights of himself and wife may be barred by foreclosure.

[4. Whether or not the land contract last mentioned should, under the facts and circumstances of this case, be given the effect of a mortgage for the purpose of foreclosure, is not decided, it being considered that the point, not having been raised in the trial court, was waived by the parties.]

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

J. E. Wildish, for the appellant.

For the respondent *Youngs* there was a brief by *Kanneberg, Cochems & Wolfe,* and oral argument by *H. O. Wolfe.*

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For the respondents *Western Securities Company, Hansen, Dixon, Kersey,* and *Borst* the cause was submitted on the brief of *Otto R. Hansen.*

The following opinion was filed April 9, 1914:

SIEBECKER, J. The plaintiff brought this action for strict foreclosure of a contract given by her to John W. Wegner on the 19th day of February, 1909, for the purchase of the premises therein described. The property thus conveyed was the homestead of John W. Wegner and his wife, *Julia Wegner,* prior to and on February 11, 1896, when they mortgaged it to secure the payment of a loan from the Wisconsin Trust Company. This mortgage was foreclosed by action, and the defendant *Julia Wegner* was made a defendant with her husband. Judgment of foreclosure was rendered March 23, 1898, a sheriff's sale under this judgment took place one year thereafter, and a sheriff's deed issued to the Wisconsin Trust Company which was recorded June 1, 1898.

On September 7, 1898, the Wisconsin Trust Company gave a land contract to *C. J. Dixon* for $10,210, the amount of the foreclosure judgment with interest and costs. At this time John W. Wegner paid on the land contract as part payment thereon the sum of $3,210.

On June 4, 1900, the Wisconsin Trust Company quitclaimed to *Dixon.* On the same day *Dixon* gave a mortgage to the Wisconsin Trust Company to secure the sum of $7,000. No written or oral contract was entered into on this occasion between *Dixon* and John W. Wegner, *Dixon* evidently taking title for Wegner's benefit.

On December 12, 1904, the Milwaukee Trust Company, as successor to the Wisconsin Trust Company, assigned its $7,000 mortgage to one Rockwell.

On January 9, 1905, Rockwell commenced foreclosure action against *Dixon,* John W. Wegner, and his wife, *Julia Wegner,* by personal service of summons and complaint, and

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on March 7, 1905, obtained judgment of foreclosure and sale. On April 23, 1906, sheriff's sale under this foreclosure judgment to the *Western Securities Company* as purchaser, of which the defendant *Otto R. Hansen* was at that time an officer.

May 21, 1906, the *Western Securities Company* entered into a land contract with John W. Wegner for the purchase of the premises for a consideration of $8,036. John W. Wegner paid $3,036 before January, 1907, at which time the *Western Securities Company,* on account of Wegner's default to make further payment under the contract, commenced an action against John W. Wegner and *Julia Wegner,* his wife, to foreclose said land contract, and on September 27, 1907, judgment foreclosing all right and interest held by the Wegners in the premises under the land contract was rendered, and it was adjudged that there was $3,851.19 due on the contract, and provided that John W. Wegner and *Julia Wegner* have the right to redeem therefrom within ninety days. There was no redemption from this foreclosure.

On October 7, 1908, the *Western Securities Company* by warranty deed conveyed the premises to *Claude V. Kersey.* On the same day *Claude V. Kersey* and wife gave a mortgage to *Charles L. Borst* to secure payment of $4,000, and conveyed the premises immediately thereafter to *Otto R. Hansen* subject to this mortgage. From September 27, 1907, the day of the entry of the foreclosure judgment on the contract of the *Western Securities Company,* John W. Wegner for himself and wife carried on negotiations with *Hansen* with the object of redeeming from such foreclosure judgment; but at no time was there a redemption therefrom.

On February 19, 1909, *Hansen* gave a quitclaim deed of the premises to the plaintiff, *Kate Youngs,* subject to the $4,000 mortgage given by *Kersey* to *Borst.*

In the *Western Securities Company's* foreclosure action on

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its land contract of May 21, 1906, personal service was had on both John W. Wegner and his wife, *Julia Wegner*. At the expiration of the period of redemption from the judgment in this action, to wit, December 27, 1907, Wegner and wife had failed to redeem, and the title vested absolutely in the *Western Securities Company*.

Wegner had paid the interest on the mortgages and some of the taxes on the property during this term of years, and the owners and mortgagors allowed him and his wife to live there without payment of any rent. He had paid various sums of money on the different land contracts under which he had possession of the property at different times, and in February, 1909, there remained against the property the $4,000 mortgage held by *Borst* and the amount due *Hansen*. The property was considered worth about $10,000. *Hansen* then offered Wegner that if he could pay the amount due aside from the $4,000 mortgage, he, *Hansen*, would convey the premises by quitclaim deed to whomsoever Wegner should direct, subject to this mortgage. Thereupon Wegner arranged with *Kate Youngs*, the plaintiff, through her husband, that she loan him $2,500 upon the condition that, when the amount due *Hansen* be paid him, he, *Hansen*, was to give her a quitclaim deed of all his interests and title to the premises, subject to the $4,000 *Borst* mortgage, and the further condition that *Mrs. Youngs* convey by land contract to Wegner, conditioned upon his paying to her the $2,500 with interest at seven per cent. at the expiration of one year. Pursuant to this arrangement *Hansen* conveyed the property by quitclaim deed to *Mrs. Youngs*, subject to the mortgage, and she gave Wegner the land contract and $2,500 in money, of which *Hansen* was paid $771.74. Upon compliance with the condition of this land contract *Mrs. Youngs* was to deed Wegner the property subject to the $4,000 mortgage held by *Borst*. Wegner defaulted in paying plaintiff the $2,500 and interest as agreed.

The plaintiff brought action to foreclose on the land con-

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tract, and after testimony was taken, but before judgment was rendered, the case was reopened upon application of *Julia Wegner,* and the court ordered the other defendants in the case to be made parties to the action. The pleadings filed raised an issue as between *Julia Wegner* and the plaintiff, claiming that the premises in question were the homestead of herself and John W. Wegner and that she had never consented nor joined in the transfers by *Hansen* to the plaintiff and from the plaintiff to her husband nor in the mortgage given by *Kersey* and wife to *Borst,* and that they were therefore void. The plaintiff amended her complaint to ask for reformation of the contract between her and Wegner so that it would represent the actual agreement of the parties, inserting in it the stipulation that she was to convey under the contract to Wegner subject to the $4,000 mortgage held by *Borst.*

The circuit court rendered a judgment in favor of the plaintiff for payment of the $2,500 and accrued interest and costs and for the foreclosing of all the right and title in the premises of John W. Wegner and *Julia Wegner,* his wife, and that they be barred unless they or either of them pay the plaintiff the amount adjudged due her with interest and costs within four months from the day of notice to them of entry of such judgment. Neither John W. Wegner, *Julia Wegner,* his wife, nor any other person has paid or caused the amount to be paid to the plaintiff pursuant to such judgment.

The circuit court held that the plaintiff, *Kate Youngs,* is the owner of the fee title to the premises and that the claim of the defendant *Julia Wegner* to a homestead right in the premises is not sustained. The record shows that *Julia Wegner* was a party defendant in the action of foreclosure on the original mortgage and in the action brought by Rockwell as assignee to foreclose the mortgage from *Dixon* to the Wisconsin Trust Company and in the action brought by the *Western Securities Company* to foreclose on the land contract it gave Wegner; and that all the right, title, and interest in and to the premises vested in John W. Wegner and *Julia Wegner,*

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his wife, were foreclosed and barred in each of such actions, and that the title to the premises became vested in the purchasers at the mortgage foreclosure sales and finally vested in the *Western Securities Company* upon default of John W. Wegner and *Julia Wegner,* his wife, to redeem on or before December 27, 1907, from the judgment foreclosing and barring their rights and interest in the premises.

It is urged that the transfers of the property on October 6, 1908, by deed from the *Western Securities Company* to *Kersey,* and the mortgage by *Kersey* and wife to *Borst* to secure the payment of $4,000, and the deed from *Kersey* and wife to *Hansen,* were made at the request and under an agreement with John W. Wegner, by which he acquired an interest in the property to which a homestead right in the premises extended. The circuit court, however, found upon the evidence in the case:

"That no written or oral agreement or promise of any nature whatsoever was made by said *Otto R. Hansen,* acting either as agent of the *Western Securities Company* or in his own behalf, granting to said John W. Wegner, or *Julia Wegner,* his wife, any right, title, or interest to the premises in question."

We cannot say that this finding of the court is against the evidence and it must stand as a verity in the case. It is manifest that *Hansen,* John W. Wegner, and the mortgagee, *Borst,* dealt in the matter in entire conformity with this finding of the court, which establishes the legal title to the property in *Hansen,* subject to the $4,000 mortgage given to *Charles L. Borst.* Under these circumstances the possession of the premises by Wegner and wife resolves itself into a tenancy which is in subordination to the rights of the owner of the property.

In February, 1909, there remained unpaid the mortgage of $4,000 held by *Borst.* The circumstances indicate that John W. Wegner prior to February 19, 1909, had paid on *Hansen's* claim an amount which reduced it to an unpaid

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balance of $771.74, and that *Hansen,* upon payment of this sum to him, indicated a willingness to transfer his interest and title to the property to any person acceptable to Wegner. It is manifest that the transaction between the parties up to this stage of their negotiations had not impaired *Hansen's* legal ownership of the property, and if John W. Wegner, or he and his wife, had acquired any rights in the property, they were subordinate to the absolute legal ownership of *Hansen.* It is contended in behalf of *Julia Wegner* that she and her husband, under the circumstances shown, acquired such an interest in the premises under the payments made by John W. Wegner prior to February 19, 1909, to the *Western Securities Company* and *Hansen* in part payment of the amount owing by Wegner under the judgment of September 27, 1907, foreclosing the land contract, as to acquire a homestead right therein. If it be assumed that such an interest and right was acquired by John W. Wegner and his wife, that in no way impaired the right of *Hansen* to transfer all his legal right, title, and interest to the property to the plaintiff, *Kate Youngs,* who under such transfer acquired all his right and title, and whatever rights and interest the Wegners had acquired was at all events subordinate to her legal rights as purchaser from *Hansen,* in whose place she stands, and enabled her to deal with the legal title and interests as absolute owner. It is claimed that the statute, sec. 2203, inhibits and renders void such transfer after the homestead right attached to the property, and that if the Wegners acquired this right the transfer from *Hansen* and *Mrs. Youngs* was void because it was made for John W. Wegner's benefit and against the rights of *Julia Wegner,* his wife. This statute prescribes how conveyances of land or any estate or interest therein may be made, and provides:

"But no mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act

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of joining in the deed, mortgage, or other conveyance, shall be valid or of any effect whatever, except a conveyance from husband to wife."

The husband under this statute is disabled from conveying the property or any interest in property to which the homestead right extends. As a matter of fact, the husband, John W. Wegner, has made no conveyance of any interest in this property after the mortgage of February 11, 1896. The claim of *Julia Wegner* that the conveyances of the legal title to *Hansen* and from *Hansen* to *Kate Youngs* were in substance and fact conveyances by John W. Wegner, is not sustained by the record. It appears that he did not acquire the title after he was divested thereof in the foreclosure proceedings in the various actions, nor was he legally entitled to enforce conveyance to him of the legal title. But it is argued that his homestead right extended to his interest in this property acquired by the payments he made on the claims against it, and that he and his wife continually occupied it as a home for many years before the commencement of this action. Assuming, without deciding, that he acquired an interest in the premises by reason of such payments and that the homestead right extended thereto, this could in no legal way extend it so as to impair the right, title, and interest vested in *Hansen* and the plaintiff under their legal ownership. Such a homestead right would of necessity be subordinate and subject to the rights of the legal owner, and if the assertion of these legal rights cuts off the rights Wegner thus acquired, that puts an end to all alleged homestead claim resting thereon. Under the land contract between *Kate Youngs* and John W. Wegner, which is sought to be foreclosed in this action, there was no alienation of any interest in this property by Wegner. It conferred upon Wegner the right to acquire the legal title and interest *Mrs. Youngs* had in the premises upon condition that he repay her the sum of $2,500 with interest within one year from its date. Upon his default she was entitled to foreclose the right, title, and interest he acquired thereby and

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be awarded possession of the premises upon such conditions as the court deemed just. The making of this land contract operated in no way to affect any right or interest Wegner or his wife then had in the premises.

True, re-entry by this action to foreclose any rights acquired under it will oust Wegner and wife of their possession, but that proceeding accomplished only what the plaintiff was entitled to do as owner of the premises before the contract was made. Under the facts and circumstances shown, the conclusions of the trial court to the effect that *Kate Youngs* on February 19, 1909, for a valuable consideration, acquired the legal title to the premises subject to the *Borst* mortgage, and that the legal and equitable rights and interest acquired by John W. Wegner and wife to the premises under the land contract given by the plaintiff to John W. Wegner have become forfeited through the default of Wegner to pay the plaintiff as the contract provides, are correct.

Whether or not, under the facts and circumstances shown, the contract given from plaintiff to Wegner should be given the effect of a mortgage for the purpose of this foreclosure action, was not litigated and must be deemed to have been waived by the parties. The court properly awarded judgment foreclosing and barring John W. Wegner and wife of all their rights and interest in and to this property.

We consider that the court properly permitted the plaintiff to amend her complaint for reformation of the contract to express the agreements of the parties and that reformation thereof was properly awarded by the court. We find the findings fully cover the material facts of the case, and that the record is free from reversible error.

By the Court.—The judgment appealed from is affirmed.

TIMLIN, J., dissents.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

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CITIZENS TELEPHONE COMPANY OF EAU CLAIRE, Respondent, vs. RAILROAD COMMISSION OF WISCONSIN, Appellant.

March 21—June 17, 1914.

Public utilities: Railroad commission: Orders, when set aside: Evidence: Telephone companies: When engaged in furnishing local service.

1. **An order of the railroad commission should not be set aside in an action brought under sec. 1797—16, Stats. 1913, unless it is shown by clear and satisfactory evidence to be unlawful or unreasonable.**
2. **A finding by the railroad commission to the effect that the local service rendered by a certain telephone company in the city of Eau Claire was incidental to its rural and toll-line service and did not constitute it a public utility engaged in furnishing local telephone service to subscribers in that city, within the meaning of sec. 1797*m*—74, Stats., is *held* to be supported by the evidence.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The plaintiff is an existing corporation organized under the laws of this state for the purpose of conducting a telephone business and particularly to acquire from the Chippewa County Telephone Company, Limited (hereafter called the Chippewa Company), certain properties and privileges to enable it to conduct a local telephone exchange in the city of Eau Claire. The capital stock of the company is fixed in its articles of organization at $60,000, consisting of 400 shares of common stock of $100 each share, and 2,000 shares of preferred stock of $10 each share. The defendant is the duly constituted *Railroad Commission* of the state of Wisconsin.

On May 21, 1913, the plaintiff by petition made application to the defendant for leave to issue and sell 300 shares of its common stock and 2,000 shares of its preferred stock, and stated to the *Railroad Commission* the purpose for which and

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the terms upon which the stocks were proposed to be issued, and alleged other material necessary matters in conformity to the provisions of secs. 1751—1 to 1753—22, Stats. 1913. The plaintiff complied with the direction of the *Railroad Commission* requiring it to file with the *Commission* a schedule of the physical properties of the Chippewa Company located in Eau Claire which the plaintiff proposed to purchase with proceeds from sales of its stock if authorized to issue and sell the same. The plaintiff's petition also alleges that the Chippewa Company, under its corporate powers and authority, was then engaged in and for many years prior thereto had been engaged in conducting a local telephone exchange in the city of Eau Claire in connection with its rural and long-distance telephone business in Chippewa and Eau Claire counties and other parts of the state. Hearing on the petition was had before the *State Railroad Commission* in the month of June, 1913. On July 30, 1913, the *Railroad Commission* made and caused to be served on the plaintiff an order whereby the *Commission* denied the prayer of the plaintiff's petition for leave to issue and sell its stock as therein demanded for the purpose of engaging in a local telephone business in the city of Eau Claire, upon the ground that the Chippewa Company at the time the petition was presented to and filed with the *Railroad Commission* or at any time prior thereto was not engaged in furnishing local telephone service in the city of Eau Claire. The plaintiff, being dissatisfied with the decision of the *Railroad Commission,* instituted this action in the Dane county circuit court praying that the *Railroad Commission's* order of July 30, 1913, be vacated and that the prayer of its petition be granted. The *Railroad Commission* answered in the action, admitting plaintiff's incorporation, that proceedings were had before it as heretofore stated, and that it rendered its decision in the proceedings as declared in the order of July 30, 1913, upon the ground that on the date of the publication of ch. 546,

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Laws of 1911, to wit, July 6, 1911, and from and after the passage and publication of ch. 596, Laws of 1911, to wit, July 8, 1911, and continually thereafter, the Wisconsin Telephone Company was and is operating a local telephone exchange in the city of Eau Claire under an indeterminate permit pursuant to secs. 1797*m*—1 to 1797*m*—105, and also upon the ground that neither the plaintiff nor the Chippewa Company was on July 6 or on July 8, 1911, or any time theretofore, furnishing local telephone service in the city of Eau Claire within the meaning of sec. 1797*m*—74. The defendant has issued no declaration to the effect that public necessity and convenience require another local telephone utility in the city of Eau Claire. After trial of the action in circuit court the court vacated the order of the *Commission* dated July 30, 1913, which denied authority to issue the stock as the plaintiff petitioned the *Railroad Commission.*

This is an appeal from the judgment of the circuit court vacating the order of the *Railroad Commission.*

For the appellant there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

A brief was also filed by *Miller, Mack & Fairchild,* attorneys for the Wisconsin Telephone Company, as *amici curiæ,* and the cause was argued orally by *E. S. Mack.*

The following opinion was filed April 9, 1914:

SIEBECKER, J. The *State Railroad Commission* found as a fact that the plaintiff, as conceded, had never engaged in furnishing local telephone service in the city of Eau Claire. It also found that the plaintiff proposed to acquire the privileges and physical properties of the Chippewa Company in the city of Eau Claire and succeed to its rights and privileges to conduct a telephone business in that city, and that

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the Chippewa Company has at no time conducted a public utility in the city of Eau Claire constituting a telephone exchange for furnishing local telephone service to the people of the city within the meaning of the statutes enacted in 1911 and 1913 which govern and control the rights of the parties on the question presented in this litigation. The circuit court after trial of the issues found as fact "that the Chippewa Company has maintained a telephone exchange which furnished service to subscribers in the city of Eau Claire ever since the month of December, 1910," and as a matter of law held that the order of July 30, 1913, of the defendant *Commission* is unlawful, and entered judgment vacating and setting it aside.

As urged by counsel for the respondent, there are but two questions presented on this record for determination: First. Does the evidence show that prior to July 6, 1911, when ch. 546, Laws of 1911, took effect, the Chippewa Company was conducting a local telephone exchange for furnishing local telephone service to the people of the city of Eau Claire? Second. If such a local telephone exchange was being operated, is the plaintiff entitled to succeed to the rights, privileges, and the property of the Chippewa Company in that city? In determining the correctness of the trial court's finding of fact upon the evidence adduced, the nature of the proceeding and statutes governing it must be considered. In an action to set aside the order of the *Railroad Commission* "the burden of proof shall be upon the plaintiff to show by clear and satisfactory evidence that the order of the *Commission* complained of is unlawful or unreasonable. . . . ." Sec. 1797—16, Stats. 1913. An examination and study of the evidence in the case convinces us that the circuit court erred in holding that the plaintiff has shown "by clear and satisfactory evidence that the order of the *Commission* . . . is unlawful." The inquiry before the circuit court and the principles that must guide it in a review

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of an order made by the *Commission* were declared in the case of *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 165, 116 N. W. 905, and is applicable here. It is there said: "In reviewing the order of the *Railroad Commission* the inquiry is not whether the rate, regulation, or service fixed by the *Commission* is just and reasonable, but whether the *order* of the *Commission* is unreasonable or unlawful." Does the record show by clear and satisfactory evidence that the order of the *Commission* is unlawful, as held by the circuit court? The determination of the *Commission* upon the evidence before it is that the service furnished by the Chippewa Company in Eau Claire did not constitute it a public utility engaged in furnishing local telephone service to the people of the city of Eau Claire within the meaning of sec. 1797*m*—74 as it stood in 1911 (amended by ch. 610, Laws of 1913). The law of 1911 provided, "no telephone exchange for furnishing local service to subscribers within any village or city shall be installed in such village or city by any public utility other than those already furnishing such telephone service therein." The amendment of 1913 states the exception in these words: "except that any public utility already engaged in furnishing local service to subscribers within any city or village may extend its exchange within such city or village without the authority of the *Commission.*"

It appears under the evidence in the case that the Chippewa Company is conducting a telephone business in Chippewa, Rusk, and Eau Claire counties, and extended its lines from Chippewa to Eau Claire in 1904 and commenced to do business in Eau Claire in the spring of 1905. It started with fifteen subscribers in the city, which increased in the course of time to twenty-eight. There were also several pay stations maintained in the city. The common council of Eau Claire, upon petition, authorized the Chippewa Company to do business in the city by resolution to the effect that

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the company "be permitted to erect poles and wires for use as a part of its system in and upon the following streets and alleys in the city of Eau Claire and not otherwise" (describing roads, streets, and alleys). It also provided that if the company at any time assigned or sold its interests to the Wisconsin Telephone Company or combined with it, "then the rights granted" were to "become null and void." The Chippewa Company was engaged in furnishing rural service. It appears that prior to 1910, if any subscriber in Eau Claire desired a connection with another in the city, he would call central at Chippewa and ask for communication through the Chippewa central. This method continued to the time when, in 1910, a new cable was put up and a common battery switchboard was installed and an operator employed to attend to the business throughout all hours of the day. Connections were made with the telephones of the subscribers at Eau Claire, the trunk lines from Chippewa Falls, and two circuits of the Tri-State Telephone Company doing business in parts of Wisconsin, Minnesota, and the Dakotas. The connection at this station connected toll with toll lines, toll with local lines, and the local with local lines in Eau Claire. The subscribers of the Chippewa Company paid uniform monthly rental for services over the entire system. The Eau Claire subscribers were business houses. It appears from the testimony that these connections were made to obtain communication with the rural subscribers for business purposes, and that communication with each other in Eau Claire was only occasional and when their local connection of the local exchange of the Wisconsin Telephone Company, of which they were patrons, was engaged. The Wisconsin Telephone Company has a local exchange in the city with approximately 2,000 subscribers. It also appears that the switchboard of the Chippewa Company installed in Eau Claire in 1910 had facilities for connecting the local subscribers in Eau Claire by means of two cords which provided

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for two local communications at the same time. The Chippewa Company, it appears, solicited subscribers in Eau Claire for out-of-town business, and the subscribers testify they made their subscription upon this understanding. The Chippewa Company's reports and rate schedules filed with the *Railroad Commission* did not list Eau Claire as an exchange until 1912. It is evident that the local service actually rendered at Eau Claire was in the nature of an occasional accommodation to the subscribers in the city and was incidental to the rural and toll-line service of the company. The evidence given by subscribers tends strongly to support this conclusion. We are persuaded by the evidence in the record that the Chippewa Company at no time operated a local telephone exchange in the city of Eau Claire for furnishing local telephone service to subscribers in the city within the meaning of the provisions of sec. 1797*m*—74, and that the finding of the *Railroad Commission* to this effect is amply sustained by the evidence. The plaintiff failed to show "by clear and satisfactory evidence that the order of the *Commission* is unlawful," and the circuit court erred in awarding judgment vacating the order. This result renders discussion of other questions unnecessary.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with directions to enter judgment affirming the *Commission's* order.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

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STATE EX REL. ARNOLD, Appellant, vs. COMMON COUNCIL OF THE CITY OF MILWAUKEE and another, Respondents.

April 10—June 17, 1914.

Officers: Removal: Milwaukee city charter: Power of common council to remove cannot be delegated: Taking of evidence by committee: Right to hearing before council itself: Charges: Sufficiency.

1. Under sec. 7, ch. XIX, Milwaukee city charter—providing that a majority of all members-elect of the common council shall have power to remove officers of the city for malfeasance in office and that the council shall provide by ordinance the manner of hearing and disposing of complaints against such officers,—such power of removal cannot be delegated by the council to another body nor to a committee of its own members.
2. In a proceeding for the removal of such an officer for cause, the substantial principles of the common law affecting private rights must be observed. The officer must be accorded the right to seasonably know the charges against him, the right to meet such charges by competent evidence, and the right to be heard by himself or by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto.
3. The evidence in such a case may be taken by a committee of the council appointed for that purpose, and if read to the council before it acts upon the report of the committee will be deemed to have been taken before the council.
4. But the right of the officer to be heard either personally or by his counsel before the common council itself, which body alone has the right to remove, cannot lawfully be denied, even though his counsel were allowed oral argument before the committee.
5. The authority given by the charter to the council to prescribe the manner of hearing did not include power to suppress or destroy a substantial constituent element of the hearing; but the council may reasonably limit and control the length of time for oral argument.
6. In the making of charges against an officer sought to be removed the accuracy of a legal pleading is not required, it being sufficient that it appears that he is thereby fairly informed of the general nature of the charge so that he can meet it upon the hearing.

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APPEAL from a judgment of the circuit court for Milwaukee county: A. H. REID, Judge. *Reversed.*

Proceedings to remove the relator, *Louis A. Arnold,* from the office of tax commissioner of the city of Milwaukee, which office he held for a definite, fixed term. Five separate charges were brought before the common council of the city of Milwaukee against the relator for malfeasance in office, the first of which reads as follows:

"That *Louis A. Arnold,* as tax commissioner of the city of Milwaukee, has violated the spirit and the letter of the civil service law in the matter of discharges of persons under him from office, and that he violated said law in conspiring and conniving to defeat the ends and purposes of said law in making appointments, and in support of this charge, I point out, that during the time that said *Arnold* has been in office that he has made more discharges of assessors under him than have been made by his predecessors, Tax Commissioners Brown, Bruce, Hooker, and Schutz, covering a period of more than sixteen years."

Upon this charge the common council of the city of Milwaukee found that *Louis A. Arnold,* as tax commissioner of the city of Milwaukee,

"is guilty of malfeasance in office in said city of Milwaukee in that he has violated the provisions of the statutes of the state of Wisconsin relating to civil service in cities by removing and discharging each of the following named persons from the office of assessor for political cause, no other cause for such removal being then existing or honestly maintained by him as such tax commissioner; that is to say, in removing and discharging Thomas F. Hayden, assessor of the Third ward; Nicholas Noll, assessor of the Tenth ward; William Bannen, assessor of the Sixteenth ward; Otto F. Salick, assessor of the Twenty-second ward, and Fred J. Huennekens, assessor of the Twenty-third ward, as found and set forth in the report of said special committee, and such conduct on the part of said *Louis A. Arnold* constitutes cause for his dismissal from the office of tax commissioner of the city of Milwaukee."

The common council also found him guilty of three other

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charges, and that his misconduct in each instance constituted cause for his removal from office. Ch. XVI of the General Ordinances of the city of Milwaukee, material upon the question of the regularity of the hearing given the relator by the common council, reads as follows:

"CHAPTER XVI.

"IMPEACHMENT TRIALS.

"Section 1. *Service of charges, etc.* Whenever any specific charges of official misconduct shall be preferred in writing against any member of the common council of the city of Milwaukee, or any other officer of said city, and the common council shall determine to investigate the same, and shall appoint a committee for the purpose of conducting such investigation, it shall be the duty of such committee to fix on a time and place for the hearing of such charges, and a copy of the same, signed by the chairman of such committee, together with a citation for the accused to appear and answer the same at the time and place fixed on as aforesaid, shall be served by the chief of police or by any police officer of said city, by delivering to the party accused a copy of such charges and citations, or by leaving a copy thereof at his usual place of residence at least five days before the time set for hearing, as aforesaid.

"Section 2. Every officer so cited before such committee shall, at the time and place fixed for said hearing, appear either in person or by counsel, and answer to said charges, and may for good cause shown, have a continuance of the investigation for such period as the committee may determine, not exceeding thirty days. He may bring witnesses and be heard before such committee, either in person or by counsel in his defense.

"Section 3. The city clerk shall, upon application, issue, under the seal of the city, subpœnas for the attendance of witnesses and the production of papers, either on behalf of the prosecution or the defense.

"Section 4. After the evidence and arguments on said hearing shall be concluded said committee shall report such evidence to the common council, with such recommendations as they may deem proper.

"Section 5. Whenever such committee shall report that

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the charges against the accused are, in their opinion, well founded, the evidence taken before the committee may be read before the common council before action is taken upon the report of the committee, and the common council may, in their discretion, hear further testimony, either on behalf of the prosecution or defense.

"Section 6. As soon as practicable after the hearing shall be concluded, the common council shall proceed to vote *viva voce* upon the question of the dismissal of the accused from office, and if upon such vote a majority of all the members elect of the common council shall vote in favor of the dismissal of the accused, he shall be considered as dismissed from office, and his office shall thereupon be vacant."

Upon *certiorari* to the circuit court for Milwaukee county to review the proceedings of the common council the court set aside each of the findings of the common council, except the first, on the ground that the action of the council thereon was without jurisdiction. As to the first finding the court held that it was supported by evidence; that the acts therein charged and found to be true constituted malfeasance in office; that the finding was made with jurisdiction and regularity, after full and proper opportunity on the part of the relator to be heard in defense; and that such finding should be affirmed. Judgment was entered affirming the action of the common council in dismissing the relator from office and in declaring the office vacant. From such judgment the relator appealed.

For the appellant there was a brief by *Doerfler, Green & Bender,* and oral argument by *W. L. Bender.*

For the respondents there was a brief by *M'Cabe & Dahlman,* and oral argument by *L. A. Dahlman.*

The following opinion was filed May 1, 1914:

VINJE, J. Two main questions are raised upon the appeal of the relator. First, Did he have the *hearing* which the charter of the city of Milwaukee and the law provide for; and if so, second, Did the evidence in any reasonable view

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thereof sustain the finding of the common council affirmed by the circuit court?

Sec. 7 of ch. XIX of the city charter provides that "a majority of all the members-elect of the common council shall have power to dismiss from office, for malfeasance in office in said city, any person elected or appointed to office in said city, except justices of the peace. And the common council shall provide by ordinance the manner of hearing and disposing of complaints against such officers." Sec. 8 of the same chapter is entitled "Investigation of charges of official misconduct," and in substance provides for the appointment of a committee to investigate and report upon the charges preferred under the section with power to take testimony and administer oaths. The next section provides for the subpœna of witnesses and penalty for perjury. Counsel for relator make a strong argument that secs. 8 and 9 have no relation to sec. 7 and cannot be resorted to in aid of the validity of an investigation for malpractice under sec. 7. Whether such argument is well founded need not now be determined. Sec. 7 provides that the common council may by ordinance provide the manner of hearing and disposing of complaints under said section, and ch. XVI of the General Ordinances, set out in the statement of facts, was evidently enacted in execution of such delegated power, and it appears that the common council attempted to proceed under the provisions of sec. 7 and the ordinance enacted in pursuance thereof. So it becomes needless to inquire into the effect of secs. 8 and 9 of ch. XIX of the city charter.

It is obvious from the provisions of sec. 7 that the power to remove an officer of the city is vested in the common council. It is equally obvious that by direct implication at least such section also provides for a hearing of the charges against the accused. Upon familiar principles the power given the common council to remove cannot by it be delegated to another body nor to a committee of its own members. Such power

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must be exercised by itself. *Darmstatter v. Passaic,* 81 N. J. Law, 162, 165, 79 Atl. 545; 28 Cyc. 440, 441; 2 Dillon, Mun. Corp. (5th ed.) § 480; 2 McQuillin, Mun. Corp. § 563. And where, as here, the removal is for cause, the proceeding is *quasi*-judicial in character and, in the absence of controlling provisions to the contrary, the substantial principles of the common law affecting private rights must be observed. *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595; *People ex rel. Keech v. Thompson,* 94 N. Y. 451, 465; 2 Dillon, Mun. Corp. (5th ed.) § 480. The charter, therefore, as well as the law applicable to the proceeding, accorded to the relator the right to a hearing before the body vested with the power to remove.

The relator claims he was denied a hearing in two respects: First, because the evidence was not taken before the common council, but before a committee thereof, and second, because he was denied the right to be heard by the common council by attorney before it acted upon the report of the committee. The first challenge of the regularity of the proceedings we hold not well taken. It is a familiar practice in legal proceedings to refer the taking of evidence to a referee or person other than the court and to report such evidence as well as the conclusions of the referee or person taking the evidence thereon to the court to act upon. Evidence so taken, reported, and acted upon by the court must in contemplation of law be deemed taken before the court. The necessity of so taking testimony by courts is quite apparent to those conversant with judicial proceedings. Much more so was there a necessity for the appointment of a committee to take the evidence in this proceeding. Over 400 printed pages of testimony are reported to this court, the taking of which, with intermissions, required weeks of time. It was not practicable for all the members of the common council to devote so much time to it. All the evidence taken was read to the common council before it acted upon the report of the com-

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mittee. It must therefore, in contemplation of law, be deemed to have been taken before the common council, and that in this respect the proceeding was regular.

The repeated refusal of the common council to grant either the written or oral request of the relator to hear his counsel before acting upon the report of the committee stands upon a different basis. There are at least three substantial elements of a common-law hearing: (1) the right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto. If either of these rights is denied a party, he does not have the substantials of a common-law hearing. *Ekern v. McGovern,* 154 Wis. 157, 277 *et seq.,* 142 N. W. 595, and cases cited. That the word "hearing" includes oral argument is expressly ruled by the following cases: *Miller v. Tobin,* 18 Fed. 609, 616; *Joseph D. G. Co. v. Hecht,* 120 Fed. 760, 763; *Merritt v. Portchester,* 8 Hun, 40, 45; *Babcock v. Wolf,* 70 Iowa, 676, 679. See, also, *Akerly v. Vilas,* 24 Wis. 165, 171. Indeed, the idea of the right of a person to be heard by himself or counsel when his property or his personal rights are questioned was so early and firmly imbedded into the groundwork of our jurisprudence that it is difficult to find instances where it has been challenged even in *quasi*-judicial proceedings. The importance and value of such right is considerable in nearly every case. It is the office of counsel to marshal the facts proven, to point out their relative importance, and to interpret them in the light of the law applicable thereto. When this is properly done the judicial mind is enlightened and is in condition to decide the questions presented with full knowledge of the facts and the law involved. Its importance in the present proceeding is apparent when it is borne in mind that the evidence taken by the committee was very voluminous, was read to the common

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council at a number of different sessions separated by considerable intervals of time, and was wholly circumstantial in character. The right of the relator either personally or by counsel to argue the evidence and the law to the common council, which body alone had the right to remove, is unquestioned. That the denial of such a right was prejudicial follows from what has been said. Nothing herein contained must be construed to question the right of the body before whom a hearing is had to reasonably limit and control the length of time for oral argument. Limitation exercised in that respect would be judicially interfered with only in case of an obvious abuse of discretion.

The fact that counsel for relator were allowed oral argument before the committee is beside the question. The committee was not the body vested with the power of removal. It could only report the evidence taken with its conclusions thereon to the common council for action. The hearing granted the relator was a hearing before the common council, which alone had the right to remove. The arguments made before the committee were not heard by nor read to the common council. They could, therefore, in no wise aid or influence it in its judgment upon the matter. The committee consisted of five members, the common council of thirty-seven.

The trial court seemed to be of the opinion that, inasmuch as the common council could by ordinance prescribe the manner of hearing, it could therefore refuse to hear oral argument. In the first place the ordinance is silent upon the question of oral argument before the common council, so it had not by ordinance prescribed a hearing without oral argument. In the second place, authority to prescribe the manner of a hearing does not include the power to suppress or destroy a substantial constituent element of the hearing itself.

Upon the oral argument the sufficiency of the charges was

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challenged. So far as such challenge relates to the charge held proven by the court it cannot be successfully maintained. The accuracy of a legal pleading is not required in such proceedings. It is sufficient if it appears that the officer sought to be removed is fairly informed of the general nature of the charge so that he can meet it upon the hearing. This the first charge did. True, it was not as definite as it could have been made, but the evidence made it definite, and he had ample opportunity to meet the charge made by the proof by counter evidence.

Since we have reached the conclusion that the relator was denied the substantial rights of a hearing secured to him both by the language of the charter and the law otherwise applicable to the removal proceedings, it becomes unnecessary to consider the sufficiency of the proof relating to the charge upon which he was adjudged guilty.

By the Court.—Judgment reversed, and cause remanded with directions to reverse the action of the common council of the city of Milwaukee finding the relator guilty of malfeasance in office and declaring the office vacant.

BARNES, J. (*concurring*). I concur in the opinion solely on the ground that I do not think any other conclusion could be reached that would be in harmony with what is decided in the *Ekern-McGovern Case.* I did not think that that decision was a correct exposition of the law as it existed before the decision was announced, and I am still of that opinion. However, that case states the law as it is now, and we are all bound to respect it regardless of any opinion that may be entertained as to the correctness of the decision when made.

A motion for a rehearing was denied, with $25 costs, on June 17, 1914.

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HANSEN, Administrator, Appellant, vs. MILWAUKEE COKE & GAS COMPANY, Respondent.

May 21—June 17, 1914.

Nonsuit: Affirmance on appeal: Power to grant new trial.

Affirmance, on appeal, of a judgment of nonsuit does not affect the power of the trial court to entertain and decide an application for a new trial on the ground of newly discovered evidence.

PER CURIAM. A judgment of nonsuit in this case was affirmed by this court December 9, 1913 (see 155 Wis. 235, 144 N. W. 289). The record of the case being still in this court, the appellant, in May, 1914, moved for an amendment to the mandate which would give to the trial court power to entertain and decide an application for new trial of the case based upon affidavits purporting to show newly discovered evidence. Notwithstanding the mandate of affirmance, we do not understand that the affirmance affects in any way the power of the trial court in the matter. We express no opinion upon the sufficiency or timeliness of the motion for a new trial.

Motion denied without costs.

ZIMMERMAN, Respondent, vs. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

May 21—June 17, 1914.

Assault and battery by watchman upon trespasser: Justification: Special verdict: Evidence: Damages.

1. **In an action for assault and battery by a watchman upon a trespasser upon defendant's property, it being claimed by defendant that the watchman acted at first in protection of defend-**

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ant's property and later in self-defense, and that he did not use unnecessary force in either instance, it was error, after rejecting questions proposed by defendant relating to both branches of the justification, to submit in the special verdict only the question whether the watchman "aggressively and otherwise than in self-defense" used "force upon plaintiff."

2. Testimony offered by defendant in such case tending to show that the watchman did not use excessive force, that his hand was wounded by a knife carried by plaintiff, that plaintiff had several times taken wood and coal from defendant's yards, and that he had been at one time arrested by another watchman for stealing wood, was erroneously excluded.

3. If at the time of the first assault upon him plaintiff was engaged in stealing the property of the defendant, the damages recoverable by him under the evidence in this case should not exceed $500.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The plaintiff complained of an assault and battery upon him by a servant of defendant on October 19, 1912. By special verdict it was found by the court that the plaintiff was at the time in question a trespasser on defendant's premises and in the act of unlawfully taking away pieces of board, and by the jury that defendant's servant, acting within the scope of his duty, did aggressively and otherwise than in self-defense use force upon the plaintiff. Compensatory damages of $1,700 were awarded, from which, by due proceedings, $500 was remitted and judgment given for the plaintiff for $1,200, interest, and costs.

There was evidence tending to show that the plaintiff was severely beaten with a club or stick, he had two ribs broken, a cut in his head an inch and a half long, a dislocated finger, a scratch in front of his ear, a small cut on his left shoulder, and his left thigh was black and blue. August Malchow, who committed the assault upon the plaintiff, was a watchman in the employment of defendant, and his testimony is to the effect that the plaintiff was stealing pieces of boards from the yard and with a knife resisted Malchow's attempt to stop

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him, whereupon the latter employed only such force as was necessary to prevent plaintiff taking the boards and to defend himself. Errors are assigned: (1) in the rejection of evidence; (2) in the questions submitted to the jury; (3) in instructions; (4) in refusal to submit to the jury questions asked for by the defendant; (5) in rejecting proposed instructions; (6) in awarding excessive damages.

For the appellant there was a brief by *Hanitch & Hartley,* and oral argument by *C. J. Hartley.*

For the respondent the cause was submitted on the brief of *George C. Cooper.*

TIMLIN, J. We have come to the conclusion that this judgment must be reversed because submitted to the jury in an improper manner prejudicial to defendant and because of erroneous exclusion of evidence, and therefore shall notice and criticise rulings upon evidence which standing alone would not suffice for reversal, so that if possible like errors may be avoided by trial courts.

The defendant requested as part of the special verdict the following questions: (1) "Did the watchman, Malchow, use unnecessary force in protecting the property of the defendant? (2) Did the watchman, Malchow, use unnecessary force in order to protect himself from the plaintiff?" With reference to the first proposed question the court was requested to instruct the jury, among other things, as follows:

"The watchman was justified in using sufficient force to protect defendant's property and to evict the plaintiff from defendant's yards. . . . You must answer this question 'No' unless you are satisfied by a preponderance of the evidence and to a reasonable certainty that the watchman did use unnecessary force in protecting the defendant's property or to evict the plaintiff therefrom."

With reference to the second proposed question the court was requested to instruct the jury as follows:

"In answering this question you will take into considera-

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tion the hour of the day, the circumstances under which the watchman found the plaintiff, any previous experience which the watchman may have had with plaintiff, any knowledge or lack of knowledge the watchman had of plaintiff. The watchman was entitled to use such force as an ordinarily careful and prudent man would have used under the same or similar circumstances and conditions."

We do not quote these requested instructions with approval, but merely to show that with the questions requested for the special verdict they brought sharply to the notice of the learned trial judge that there were two branches of the defendant's justification, the first relating to the aggressive advance upon plaintiff in the protection of defendant's property and the second relating to the watchman's own right of self-defense against attack by the plaintiff upon the watchman after the latter had undertaken to prevent the carrying away of defendant's property. These two questions were prominently in the case. The learned trial judge, to cover the assault and battery, submitted only one question, as follows: "3. Did Malchow aggressively and otherwise than in self-defense use force upon plaintiff?" This question did not properly present to the jury the issue to be tried. It might well have been that Malchow "aggressively and otherwise than in self-defense" used some force upon the plaintiff in the first place to prevent the latter carrying away the property of defendant. But this would not create a liability unless the force so used was unnecessary or excessive. Under this question and the instructions given relative to it the jury could well have understood that the only justification was self-defense, when there was in fact and as to the first aggressive act on the part of Malchow the justification of protecting property in his charge against trespass or larceny, and also the further attempted justification of the succeeding violence by the claim of self-defense. It was not disputed that Malchow was the aggressor in his attempt to protect the property and that he began the affray by the use of something

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like an assault for this purpose and was not at this stage of the affray acting in self-defense, but he claimed this was followed up with force exerted in self-defense. The court, therefore, rejecting questions proposed by defendant, submitted an incorrect and misleading question to the jury. This is serious error and was no doubt prejudicial. Under the uncontroverted evidence the jury could hardly have answered this question otherwise than in the affirmative.

Describing the affray for the purpose of attempting to show that he did not use excessive force, Malchow, on the part of the defendant, testified: "I had a revolver with me. I used a flashlight. I did not use my revolver. I did not use anything but my stick and my feet. I saw I wasn't in danger." On motion of plaintiff's counsel this last sentence was stricken out. "I struck at him simply because I kept his hand away from me, kept the knife away from my feet." On motion of plaintiff's counsel this statement was stricken out. "I got away from him just as quick as I could." On motion of plaintiff's counsel this was stricken out. Another witness for the defendant testified that Malchow came to his office after the affray and told him of the difficulty with plaintiff and showed his wounded hand. The court sustained an objection to a question asking whether the hand was cut or merely skinned. Malchow had testified that prior to the affray in question plaintiff had been taking things out of the yard, and another witness was asked whether he had ever seen *Mr. Zimmerman* in the yards prior to that time, and an objection to that question was sustained. He was then asked how often he had seen *Mr. Zimmerman* in the yards during the month of October prior to the 19th. An objection to that question was sustained. Defendant then offered to prove by the witness that he had seen the plaintiff in the yards several times during the month of October prior to October 19th and had seen him take wheat and coal from the yards. An objection to that offer was sus-

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tained. After the various attempts to prove by another witness that the plaintiff had been in the yards and what he was doing, all of which was ruled out by the court, the defendant offered to show by this witness that in the month of October prior to the 19th plaintiff came into the yard and went to the pile of coal belonging to defendant and started to take the same and the witness ordered him out of the yard. An objection to this offer of evidence was sustained. Still another witness was called by the defendant, who had been a watchman, and he was asked: "At the time you were watchman there did you arrest *Mr. Zimmerman* for stealing wood?" He answered "Yes, sir," and the court on motion struck out the answer.

In our opinion these rulings were entirely too technical and there are no rules of evidence under which they can be justified. They are of the same nature as the rulings condemned in *Schultz v. Frankfort M., A. & P. G. Ins. Co.* 151 Wis. 537, 139 N. W. 386. We are further of the opinion that, if it is conceded or established by proof that the plaintiff at the time of the first assault upon him was engaged in stealing the property of the railroad company, the damages even as fixed by the court are excessive, and unless a larger measure of pecuniary loss by plaintiff is proven upon another trial the verdict, if plaintiff has a verdict, should not exceed $500. *Nelson v. Snoyenbos,* 155 Wis. 590, 145 N. W. 179.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

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KNUDSON and another, Appellants, vs. GEORGE, Respondent.

May 21—June 17, 1914.

False representations: Inducing purchase of land: Joint adventurers: Duty of one to another: Skilled woodsman: Negligence in locating land: Damages: Appeal: Discretionary powers of supreme court.

1. When a person induces another to purchase land by making materially false representations as to its quality or quantity under circumstances which entitle the vendee to rely thereon, the vendee may rescind the contract and recover the purchase money, or may affirm the sale and recover the damages which he sustains; and this he may do whether the representations were made fraudulently or merely negligently.
2. A woodsman and cruiser who induced other persons to buy certain land as a joint adventure with him, they furnishing the money and he receiving a one-third interest in the land, owed to them a duty, not merely to exercise good faith and ordinary care in locating the land to be purchased, but to exercise that higher degree of diligence and skill which a woodsman of his supposed skill ordinarily exercises under like circumstances; and if by failing to perform that duty he misled them as to the land they were getting, they are entitled to recover from him their damages, consisting of the difference between the value of the land actually bought and that which he led them to believe they were buying.
3. Where, on appeal to the supreme court, it appears that "the real controversy has not been fully tried" or that justice has miscarried, that court may, under sec. 2405*m*, Stats., give relief regardless of the failure to take proper exceptions or frame proper pleadings, and may direct such procedure in the trial court as shall be deemed necessary to accomplish the ends of justice.

APPEAL from a judgment of the circuit court for Barron county: FRANK A. ROSS, Circuit Judge. *Reversed.*

This is an action to recover damages because of false and fraudulent representations in the sale of 160 acres of land alleged to have been sold by the defendant to the plaintiffs. A trial was had before the court and a jury, and it appeared

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that in August, 1909, the defendant (who was a woodsman and cruiser) suggested to the plaintiffs that a good investment could be made by purchasing a certain 160 acres of land at $5 an acre, and also suggested that the plaintiffs should furnish the money to buy it, they taking a two-thirds interest and he a one-third interest. The parties went to see the land. By mistake they inspected the wrong quarter-section. The plaintiffs claim that defendant pointed out the land to them and was solely responsible for the mistake. The defendant claims that they took a map and all three acted in locating the land from the map, and that there was an error in the location of a highway on the map, which error caused the mistake. In any event a mistake was made, and the parties examined a valuable and well-wooded quarter-section, while the quarter-section which was in fact for sale was on the other side of the highway and was rough and rocky. After the examination the plaintiffs agreed to defendant's proposition and furnished the defendant $400 with which to make the first payment, and afterwards furnished $400 more to complete the purchase. The defendant procured a deed of the less valuable parcel from the owners (who lived in St. Paul) and deeded an undivided two-thirds to the plaintiffs. The mistake was not discovered by either party for more than a year. In December, 1910, the plaintiffs purchased of the defendant his undivided one-third for $154.50. Some time after this sale the mistake was discovered and this action was brought, claiming that the defendant fraudulently showed the plaintiffs the wrong lands. The trial court submitted to the jury a special verdict composed of two questions: (1) What was the value of the land actually conveyed at the date of the conveyance, viz. September 22, 1909? and (2) What was the value of the lands which the parties looked over at that time? In answer to the first question the jury said $400, and to the second question $1,200. Neither party asked for the submission of any other questions. The plaintiffs moved to

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change the answer to the second question from $1,200 to $1,920, and, in case the motion was denied, for a new trial. Neither motion was granted. Subsequently the trial judge made findings of fact to the effect that the defendant did not agree to sell the lands to the plaintiffs, but that plaintiffs and defendant purchased the lands from the owners as a joint adventure; that by mistake honestly made, resulting from an erroneous map, the defendant misled the plaintiffs into the mistaken purchase; that the lands actually purchased were of materially less value than the lands which the parties looked over; and that at the time of the purchase by the plaintiffs of the defendant's undivided one-third the parties were still in ignorance of the mistake. Upon these findings the trial court dismissed the complaint. No exceptions were taken to the findings. The plaintiffs appeal.

For the appellants there was a brief by *Larson & Gilbertson,* and oral argument by *A. S. Larson.*

For the respondent the cause was submitted on a brief signed by *Clarence C. Coe* and *Arthur E. Coe.*

WINSLOW, C. J. When a person induces another to purchase land by making materially false representations as to its quality or quantity under circumstances which entitle the vendee to rely thereon, the vendee may rescind the contract and recover the purchase money or may affirm the sale and recover the damages which he sustains. *Baker v. Becker,* 153 Wis. 369, 141 N. W. 304, and cases cited. And this he may do whether the representations were made fraudulently or merely negligently. *Miner v. Medbury,* 6 Wis. 295; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Kathan v. Comstock,* 140 Wis. 427, 122 N. W. 1044; *Stelting v. Bank of Sparta,* 136 Wis. 369, 117 N. W. 798.

The complaint charged a sale of the land by the defendant to the plaintiffs, and had this been proven doubtless the principle above stated would have applied and the plaintiffs

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would have been entitled to recover, but the court found that the transaction was in fact a joint adventure in which all the parties embarked for mutual gain. This was the nature of the transaction as claimed in the answer, and the evidence in support of this finding is quite satisfactory, if not substantially undisputed. In any event the plaintiffs are in no situation to complain of it now, for they did not ask the court to submit the question to the jury, nor did they except to the finding of the court.

Joint adventurers owe each other practically the same duties as partners. *Marston v. Gould,* 69 N. Y. 220; 23 Cyc. 453. Partners owe each other the exercise of good faith and ordinary care and prudence, and if loss occurs by the conduct of one partner the loss falls on the firm unless there has been default by that partner in the performance of one or both of those duties. *Carlin v. Donegan,* 15 Kan. 495; *Bohrer v. Drake,* 33 Minn. 408, 23 N. W. 840; 1 Lindley, Partn. (2d Am. ed.) 386.

The situation of a partner or joint adventurer is quite analogous to the situation of one who contracts to render services to another. He contracts for good faith and integrity, but not that he will commit no errors. For negligence, fraud, and dishonesty he is liable, but not for nonnegligent mistakes. If he contracts for a particular or extraordinary degree of skill or expertness, a higher degree of diligence and skill will be required of him. *Noble v. Libby,* 144 Wis. 632, 129 N. W. 791. It follows that the defendant ought not to have been discharged from liability simply because he was not guilty of fraud or bad faith. As a joint adventurer and one claiming superior skill in the locating of land he owed his colleagues the exercise not only of care but of a higher degree of skill than the ordinary man, namely, that degree which would be and ordinarily is exercised by persons skilled in the business under similar circumstances. The question whether the defendant fully discharged this duty has never

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been tried or decided in this case. It is true that no request was made that the question be submitted to the jury or passed upon by the court, and it is also true that the point is not made by the appellant in his brief on this appeal. This court is not now fettered by any such omissions. If it appears to the court from the record that "the real controversy has not been fully tried" or that justice has miscarried, this court may give relief regardless of the failure to take proper exceptions or frame proper pleadings. Sec. 2405*m*, Stats. In this case there were really two serious questions on the merits, viz.: (1) Was the defendant guilty of fraud or bad faith in showing the plaintiffs the wrong piece of land? (2) If not, then did he fail to exercise that degree of diligence and skill in locating the land that a woodsman of his supposed skill ordinarily exercises under like circumstances? The first of these questions has been tried and decided without error, and the conclusion is deemed to be amply supported by the evidence. That issue will not again be opened, but the second question has never been tried, and it seems to the court that as to this question the case falls squarely within sec. 2405*m*, *supra*. It will not be necessary to amend the pleadings. The question suggested is very simple and may be determined by the trial court without a jury upon the evidence already taken on the first trial, and such additional testimony relevant to that question as the parties may produce. If it be found by the court upon the trial of this question that the defendant was negligent in locating the tract under the principles laid down in this opinion, the plaintiffs will be entitled to recover their damages, which will be the difference between the value of the land actually purchased and the land which they were led to believe they were purchasing. *Gunther v. Ullrich*, 82 Wis. 222, 52 N. W. 88; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406. These sums have been already fixed by the verdict of the jury without material error, and the question will not need to be again tried.

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If, on the other hand, the court shall find that the defendant was not negligent in locating the land, he will be entitled to dismissal of the complaint.

By the Court.—Judgment reversed, and action remanded for further proceedings in accordance with this opinion.

CHRISTENSEN, Administrator, Appellant, vs. CHRISTOPHER, Respondent.

May 21—June 17, 1914.

Gifts causa mortis: Certificates of deposit: Evidence: Sufficiency: Executors and administrators: Judgment.

1. In an action of replevin brought by an administrator to recover certificates of deposit which had belonged to his intestate, testimony of the defendant and her daughter (with whom the intestate was boarding and who took care of him in his illness), corroborated by other evidence tending to show that he did not wish his children to have his property, is *held* to sustain a finding by the trial court to the effect that, after suffering a stroke of paralysis which caused his death three days later, the intestate made a valid gift to defendant of said certificates.
2. In an action brought by an administrator, a judgment that the defendant "recover from the plaintiff" six cents damages and the costs of action is construed as a judgment against plaintiff as administrator and not individually.

APPEAL from a judgment of the circuit court for Polk county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is an action for replevin brought by *Henry Christensen* as administrator of the estate of Nels Christensen, deceased, to secure property from the defendant upon the ground that she unlawfully held and detained certificates of deposit, the property of the plaintiff as administrator of the estate of the deceased. Judgment was rendered in favor of

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the defendant for six cents damages and for costs. This is an appeal from such judgment.

Morris E. Yager, for the appellant.

For the respondent there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally.*

SIEBECKER, J. Nels Christensen suffered a stroke of paralysis on May 4th which caused his death on May 7, 1912. At this time the deceased was living with the defendant and had theretofore lived and roomed at defendant's house, as she testifies, "off and on for eleven years." He had a room and boarded there, paying $12 per month. *Mrs. Christopher* took care of him while sick at the time of his death and had done so before. Shortly before his death decedent had secured two certificates of deposit from the Bank of St. Croix Falls, one amounting to $100 and another to $1,200. His other property consisted of a purse containing a $20 gold piece and some small change. He had placed these and his personal effects in the defendant's possession for keeping.

He was stricken with paralysis about 9 or 9:30 o'clock in the evening. The defendant's husband, upon discovering that the decedent had been so stricken, immediately procured the attendance of a doctor. The defendant and her daughter, Sirene, sixteen years of age, waited on decedent before the doctor arrived. The daughter testified that he made a mumbling noise trying to say something and in a stammering way uttered the word "papers;" that she then told her mother that he wanted his papers and her mother told her to get them, which she did; that these consisted of the above mentioned certificates and his naturalization papers; that his purse, containing a $20 gold piece, was with them; that her mother handed all of the papers and the purse to him; that he took the naturalization papers out of the envelope and looked at them and put them aside and then took the certificates out of an envelope, handed them over to *Mrs. Chris-*

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topher by placing them in her right hand and placing her left hand over them; that defendant then asked him if they were to be hers and that he nodded and uttered the word "Ya," meaning "Yes" in Danish; and that her mother then said "I accept them." A few minutes later the doctor arrived and took charge of him. It was also shown in testimony that he had stated to two or three persons that when he died he did not want his family to have any of his property, and that he wished those with whom he lived to have it. There was also testimony to the effect that decedent had stated that he wanted to move from his boarding place, as he was watched too closely by the defendant. After his death on May 7th proceedings were had in the county court and *Henry Christensen* was made administrator of the estate and demanded the certificates of deposit then in the possession of the defendant, which she refused to give up, claiming that she was the rightful owner of such certificates as donee under the gift made by decedent. A jury trial was waived by both parties and the action was tried by the circuit court. The court found the following facts:

"4. That the payee named in said certificates died on May 7, 1912, but that prior to his death, being then the lawful owner of said certificates, he made a valid gift thereof to the defendant, which said gift was duly accepted by the defendant prior to such death of said payee."

An examination of the record discloses that the court relied upon the defendant and her daughter, who testified to the acts and circumstances of the making of the gift. Their evidence is corroborated by the evidence tending to show that decedent did not want his children to have the property. This evidence is opposed only by the opinion testimony of the doctors, one of whom attended decedent within from fifteen to twenty minutes after decedent was observed in his bed by the defendant's husband suffering from a stroke of paralysis. The doctors testified that in their opinion de-

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cedent was mentally and physically incapacitated from doing the acts and uttering the words which defendant and her daughter testified he did and uttered at the time the gift is claimed to have been made. The trial court saw the defendant and her daughter on the witness stand and heard them when they testified and was much better informed as to the credibility and the weight of their evidence than this court can be from the printed record. Giving due weight to the trial court's conclusion upon the evidence, it is clear that his finding of the facts is amply sustained in the record.

It is suggested that the judgment is erroneously entered against the plaintiff individually. The record shows that the plaintiff is prosecuting the action as administrator, and the court nowhere in the record suggests that the plaintiff is personally liable in the prosecution of this action. It is manifest that the judgment is one against the plaintiff as administrator of the estate of Nels Christensen, deceased, and that it is not intended to be one against the plaintiff individually.

By the Court.—The judgment appealed from is affirmed.

BREEN, Respondent, vs. ARNOLD, Appellant.

May 21—June 17, 1914.

Vendor and purchaser: Breach of contract by vendor: Rescission: Recovery of money paid: Settlement of claim by one of several purchasers: Costs: Time for perfecting judgment.

1. Where the vendees named in a land contract were not partners and would have become tenants in common if the contract had been consummated, one of them had no legal right, after a breach of the contract by the vendor, to settle with the vendor the claim of the other vendee for the recovery of purchase money paid by the latter.
2. Where the vendor in a land contract failed to furnish an ab-

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stract as agreed, was unable to deliver the deed as called for, and refused to comply with the terms of the contract, the vendee had a right to stand upon such breaches and recover the money which he had paid.

3. Where, after a verdict in plaintiff's favor, defendant moved for judgment and also moved for a new trial, the sixty days within which, under sec. 2894*a*, Stats., plaintiff must perfect his judgment in order to be entitled to costs, did not begin to run until such motions were determined.

4. In such a case, where the record does not show when the motions were determined, and the trial court refused to disallow costs, it will be presumed that the costs were taxed in due time.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action brought by the plaintiff to recover from the defendant the money the plaintiff paid defendant on a contract for the purchase of a lot. It is shown that the defendant, on March 17, 1911, as agent for the owner of the lot, made an agreement with the plaintiff to sell him a five-acre lot of land and that the plaintiff paid the sum of $125 of the purchase price; that the plaintiff received a receipt which embraced the agreements of the parties, by which a conveyance of the lot by warranty deed was to be given to the plaintiff and one J. J. Wirtz. Wirtz also paid the sum of $125 on the purchase price of the lot. The lot consisted of five acres of land and was valued at $2,250. It was agreed that the defendant should furnish the plaintiff and Wirtz an abstract and that the conveyance should be completed by the payment of the balance of $2,000 on or before June 15, 1911. The plaintiff procured the money and held it on deposit in a bank and was ready to pay his one-half part of the purchase price on April 18th, at which time defendant informed him that the owner of the lot refused to convey the lot specified in the agreement unless a sale and transfer were made of another lot of five acres situated in the same plat. The bank, acting as the owner's agent for delivery of the deed and to re-

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ceive the purchase money for the lot from the plaintiff and Wirtz, insisted that both lots be transferred at the same time as a condition to conveying the lot for which the plaintiff and Wirtz had bargained. The jury found that the defendant wholly failed to deliver the abstract as agreed by the parties to this transaction, and a general verdict for the plaintiff assessing his damages at the sum of $136.87. The court awarded judgment in plaintiff's favor for this amount and for costs. This is an appeal from such judgment.

The cause was submitted for the appellant on the brief of *R. I. Tipton,* and for the respondent on that of *W. P. Crawford.*

SIEBECKER, J. The points raised and argued upon the record present the inquiry: Has the plaintiff a right to recover the purchase money paid by him for the lot in question? It is averred that the cause of action for the recovery of the $250 paid by the plaintiff and Wirtz on the purchase price of the lot is a joint claim, and that a settlement between Wirtz and the defendant and dismissal of Wirtz as a plaintiff with *Breen's* consent operated as a full satisfaction of the plaintiff's right to recover his share of the money paid on the purchase price. The court correctly held that the relationship of copartners between the plaintiff and Wirtz did not exist. It is apparent from the transaction that the plaintiff and Wirtz, under the contract, if consummated, would have been tenants in common of the five-acre lot and that they each individually agreed to pay one half of the purchase price. Under the circumstances Wirtz in no way had the legal right to settle the plaintiff's claim for the recovery of the purchase money paid by him, and the court properly denied the defendant's motion for judgment upon this ground. It is contended that the court erred in awarding judgment on the verdict because the record fails to show there was a rescission of the contract. The jury found that the defendant breached the contract for sale and purchase of the lot in that

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he failed to provide the plaintiff an abstract as agreed. The evidence warrants this finding. It also appears that the defendant was unable to make delivery of the deed as called for by the contract of sale and that he failed and refused to comply with the terms and conditions of the agreement. The plaintiff had a right to stand on such breaches of the contract of sale and demand the return of the money he paid under it with interest. The jury awarded him this amount and the judgment must be affirmed as correct.

It is urged that the plaintiff forfeited his right to recover his costs in the action under sec. 2894*a*, Stats., because he omitted to perfect the judgment within sixty days after the rendition of the verdict. The record shows that the defendant made a motion for judgment after the verdict. This state of the proceeding necessarily required that entry of judgment be held in abeyance until the court had passed on this motion. It also appears that the defendant's motion for a new trial was pending. The costs were taxed and allowed July 12, 1913. The record is not clear and definite when the court passed on these motions. Since, however, the court refused to disallow costs, it must be presumed that the costs were taxed within the sixty days thereafter as required in such cases. *Dresser v. Lemma,* 122 Wis. 387, 100 N. W. 844; Circuit Court Rule XXXIII.

By the Court.—Judgment affirmed.

OUELLETTE, Appellant, vs. SUPERIOR MOTOR & MACHINE WORKS, Respondent.

May 21—June 17, 1914.

Automobiles: Injury to pedestrian: Negligence: Contributory negligence: Questions for jury: Master and servant: When relation exists: Chauffeur furnished by garage keeper: Who liable for his negligence.

1. In an action for injuries to a person who, while standing in the street waiting for a street car, was struck by an automo-

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bile, it appeared that the automobile was running very slowly, that plaintiff was plainly seen by the chauffeur, and that there was plenty of room to pass him; but the evidence being conflicting as to whether plaintiff stood still or, just as the automobile was about to pass him, stepped backward in front of it, the question of the chauffeur's negligence is *held* to have been one for the jury.

2. Upon plaintiff's testimony in such case that he did not hear the automobile horn, that he had been standing where he was but a very few seconds, that he did not move before being struck, that one car which he wished to take had run by him, and that he was intent on signaling another so as not to be delayed, the question of his contributory negligence is *held* to have been for the jury.

3. Where the owner of an automobile stored it at a garage under an agreement by which the garage keeper, for an agreed compensation, was to furnish a chauffeur from time to time as requested to drive the car (it being left to the garage keeper to select the driver and pay him his compensation and to hire and discharge him at pleasure), the relation of master and servant existed between the garage keeper and the driver, and the garage keeper was liable for negligence of the driver while operating the car at a time when the owner was an occupant thereof, if such owner did not assume to direct or control the method or manner of driving, further than to tell the driver where he desired to go.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

On September 4, 1912, while plaintiff was standing at the southwesterly intersection of Tower avenue and North Twelfth street, in the city of Superior, between the curb and the street-car track, waiting to board a south-bound car on Tower avenue, he was run down by an automobile driven by one Knutson, an employee of the defendant, and this action was brought to recover damages for injuries sustained. The complaint alleged that the plaintiff was standing at the place where pedestrians usually and customarily stood preparatory to boarding south-bound street cars,—about four feet from the westerly track and on the west side thereof; that by reason of the negligent and careless driving of the automobile by

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the chauffeur plaintiff was struck and injured. The automobile was owned by Reverend Fardy and at the time of the accident he and three other clergymen were riding therein. The automobile was stored at the garage of the defendant and a chauffeur was provided by the defendant whenever requested. Tower avenue was being paved at this time and only the westerly side of the street was open to traffic. The complaint further alleged that the chauffeur at the time of the accident was in the employ of the defendant and was acting within the scope of his employment and in the furtherance of the business of said defendant. The answer denied the material allegations of the complaint and alleged contributory negligence on the part of the plaintiff. At the close of the testimony the court granted the motion of the defendant for a directed verdict in its favor, holding that at the time of the accident the chauffeur was acting as the servant of Reverend Fardy and for the time being was under his control. Judgment was entered accordingly, and from such judgment plaintiff appeals.

For the appellant there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *George B. Hudnall.*

Solon L. Perrin, for the respondent.

BARNES, J. The respondent urges that the judgment of the circuit court is correct (1) because the driver of the automobile was not negligent; (2) because the plaintiff was guilty of contributory negligence; and (3) because the relation of master and servant did not exist between the defendant and the driver of the automobile at the time of the accident, at least not to the extent that the rule of *respondeat superior* applies in the case.

1. The evidence offered in behalf of the defendant tended to show that the automobile was running very slowly at the time of the collision; that the plaintiff was observed by the driver and the other occupants of the car; that the horn of

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the automobile was sounded; that there was plenty of room for the automobile to pass between the plaintiff and the curb; and that the injury was caused by reason of the plaintiff stepping backwards toward the curb and in front of the automobile just as it was about to pass him. The explanation is plausible and probable.

The plaintiff, however, testified that he was standing near the street-car track for the purpose of signaling an approaching car and that he did not move from the time he took his position there until he was struck by the automobile. There is some other evidence in the case which tends to corroborate this. This evidence raises a jury question. If a jury should find the testimony of the plaintiff to be true, there could be no doubt about the negligence of the driver, because there is abundant evidence to show that plaintiff could be plainly seen and was seen and that there was plenty of room to pass him. Once it is established as a verity in the case that the plaintiff did not move from the position in which he stood, it would be difficult to escape the conclusion that the driver would have been guilty of manslaughter if plaintiff had been killed. The contention that there was no question with reference to the driver's negligence for the jury to pass upon cannot prevail.

2. On the question of contributory negligence the case is somewhat closer. The plaintiff apparently paid no attention to the automobile horn. He says he did not hear it. He was not keeping a lookout for vehicles approaching him from the rear. However, he testifies that he had been standing where he was but a very few seconds; that one street car had run by him which he desired to take, and that he was intent on signaling another so as not to be delayed on his homeward journey, and we think on the whole it was a question for the jury to answer whether or not he exercised under the circumstances that degree of care and prudence which is ordinarily exercised by the great mass of mankind under the same or similar circumstances.

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3. On the third proposition relied on by the defendant the court directed a verdict in its favor, and this ruling presents the principal as well as the most interesting question in the case, which is this: Where the owner of an automobile stores it at a garage under an agreement by which the garage keeper, for an agreed compensation, is to furnish a chauffeur from time to time as requested to drive the car (it being left to the garage keeper to select the driver and pay him his compensation and to hire and discharge him at pleasure), is the garage keeper liable for the negligence of the driver while operating the car, the owner being an occupant thereof, but not assuming to direct or control the method or manner of driving, further than to tell the driver where he desires to go?

Had the car and driver been hired from the garage keeper there would be no doubt that the rule of *respondeat superior* would apply. This court has so decided. *Gerretson v. Rambler G. Co.* 149 Wis. 528, 136 N. W. 186; *Hannon v. Van Dycke Co.* 154 Wis. 454, 143 N. W. 150. The law elsewhere is in harmony with these decisions, which really rest on the principle established in numerous cases dealing with the liability of livery-stable keepers. See notes to *Frerker v. Nicholson* (41 Colo. 12, 92 Pac. 224) 13 L. R. A. N. S. 1122, and *Morris v. Tredo* (83 Vt. 44, 74 Atl. 387) 25 L. R. A. N. S. 33; Berry, Automobiles, § 147; also note to *Kellogg v. Charity C. Foundation* (203 N. Y. 191, 96 N. E. 406), cited in 26 Am. & Eng. Ann. Cas. 886; 1 Thomp. Comm. on Neg. § 581; *Meyers v. Tri-State A. Co.* 121 Minn. 68, 140 N. W. 184.

There are also some cases which approach the one under consideration more closely in their facts than do the cases cited. In these cases the occupant of the vehicle owned it, but the horse and driver were furnished by the liveryman. In such cases the latter has been held liable for the negligence of the driver. *Kellogg v. Charity C. Foundation,* 203 N. Y. 191, 96 N. E. 406 (see comprehensive note to this

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case in 26 Am. & Eng. Ann. Cas. 883–885); *Quarman v. Burnett,* 6 M. & W. 499; *Jones v. Mayor, etc.* L. R. 14 Q. B. Div. 890; *Parsons v. Wisner,* 113 N. Y. Supp. 922.

The case of *Neff v. Brandeis,* 91 Neb. 11, 135 N. W. 232, 39 L. R. A. N. S. 933, is not distinguishable in principle from the case under consideration. There the defendant owned the car and kept it in a garage under a contract to pay a stipulated sum for storage and for a driver whenever desired. The accident occurred while the chauffeur was taking the car from the defendant's home to the garage. The defendant was not in the car when the accident occurred, but if the chauffeur was the defendant's servant while defendant was riding in the car, surely he was his servant for the purpose of taking the car from the defendant's home to the place where he desired it stored. The court held that the chauffeur was not the owner's servant.

The case of *Dalrymple v. Covey M. C. Co.* 66 Oreg. 533, 135 Pac. 91, 48 L. R. A. N. S. 424, in which the garage owner was held liable, would also seem to be on all-fours with the present one. There the owner of the car was occupying it when the accident occurred and had given directions where to go and when to stop to the chauffeur furnished by the defendant.

The mere fact that Father Fardy was the owner of the automobile does not make him responsible and much less solely responsible for every injury caused by it. *Steffen v. McNaughton,* 142 Wis. 49, 124 N. W. 1016; *Cunningham v. Castle,* 127 App. Div. 580, 111 N. Y. Supp. 1057; *Reynolds v. Buck,* 127 Iowa, 601, 103 N. W. 946; Babbitt, Motor Vehicles, § 582.

The respondent cites a number of cases as holding that, where the general servant of one person is loaned or furnished to another, he thereupon becomes the servant of the one for whom the service is being performed and the latter is liable for his negligence. This is no doubt accurate enough

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where the servant is placed under the control of the person for whom the work is being done and the latter assumes to direct the manner of doing the work. Most of the cases cited are of this class. In some of them this distinction is not very closely observed, but we think it forms the true line of demarkation between liability and nonliability. If one arranges with a painter or a carpenter who has several men in his employ to send a man to do a certain piece of work and points out to such person the work which he desires done, but does not undertake to direct, control, or interfere with the manner of doing the work, the relation of master and servant does not arise, and the liability for the negligence of the servant toward a third party would rest on the general employer. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041. On the contrary, if the party for whom the work was being done undertook to direct what should be done and how it should be done, he would thereby make the employee his own servant and become liable for the servant's negligence in following his directions. Where a general employer of labor, in response to calls, assigns his men to do certain jobs, presumably he is making a profit out of their labor by receiving more for it than he pays the laborer. There can be little doubt that such employees are facilitating their master's business while doing the work assigned them. Here the general employer had the right to hire and discharge the employee. The owner of the car made no stipulation that any particular employee should do the work. The plaintiff offered to prove that the garage keeper did not give any authority to the owner to control the chauffeur and that the owner did not assume any control over him except to designate the streets over which he desired to pass. The evidence was ruled out by the court on the ground that it was immaterial. It seems clear that under the principle referred to the relation of master and servant not only existed between the defendant and the chauffeur, but also that the rule of

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respondeat superior applied, assuming that the proofs offered were forthcoming. There seems to be more reason to hold that there is liability in automobile cases than in livery-stable cases. Most people either know how to drive a horse or how one should be driven and can ordinarily tell when a driver is reckless or incompetent. Many people own automobiles who know nothing about driving them. It requires some degree of experience and skill to do the work safely and properly. Under such a contract as here existed between the owner of the car and the defendant, the owner was obliged to rely on the knowledge and skill of the garage owner to procure a safe and competent driver. We are only concerned with the liability of the defendant, and conclude that it was error to direct a verdict.

By the Court.—Judgment reversed, and cause remanded for a new trial.

MILWAUKEE WORSTED MILLS, Appellant, vs. WINSOR, Trustee, Respondent.

May 21—June 17, 1914.

Sales: Rescission: False representations as to solvency: Special verdict: Instructions to jury: Evidence: Copy of writing: Fraud: Degree of proof required: New trial: Newly discovered evidence.

1. In replevin to recover goods on the ground that their sale by plaintiff was induced by fraudulent representations made by the vendee as to its solvency, the issue being as to whether or not the representations were made, and there being no claim that, if made, they were not made for the purpose of inducing the sale, there was no prejudicial error in submitting to the jury the question: "Did [the vendee] misrepresent to the plaintiff the material facts, knowing, or under such circumstances that it ought to have known, the truth, for the purpose of inducing the plaintiff to sell to it the property in question?"

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2. Nor was it misleading in such case to instruct the jury that the issue was whether the defendant "purposely" misrepresented the facts so as to induce the plaintiff to part with the goods.
3. A statement as to the vendee's solvency, claimed to have been made by it to a credit agency, was properly excluded, because it was not the original statement and no foundation had been laid for introduction of a copy.
4. The burden is upon a party alleging fraud to prove it by clear and satisfactory evidence.
5. Refusal to grant a new trial on the ground of newly discovered evidence was not an abuse of discretion where proper diligence to obtain such evidence before the trial was not shown, and especially where the evidence had only a remote bearing on the case.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action of replevin. December 28, 1912, the plaintiff sold on credit 1,000 pounds of yarn to the Superior Knitting Mills, which was delivered in January, 1913. March 19, 1913, the plaintiff brought this action on the ground that the sale had been induced by false and fraudulent representations as to the financial standing of the Superior Knitting Mills. April 3, 1913, the latter was declared a bankrupt and *G. H. Winsor,* as trustee in bankruptcy, was by order of court substituted as defendant.

Under date of June 26, 1912, the Superior Knitting Mills made a financial statement to the Bradstreet Agency which statement was embodied by it in a report made to the plaintiff July 11, 1912. At the time this statement was made to the Bradstreet Agency the financial condition of the Superior Knitting Mills was substantially as therein set forth. In December, 1912, the Superior Knitting Mills sustained heavy losses, and plaintiff claims that at the time of the sale of the yarn, Sorensen, its president, represented that its financial condition was substantially the same as when the statement to the Bradstreet Agency was made. This is denied by Sorensen.

The issue was submitted to the jury on a special verdict,

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the first question of which read: "Did the Superior Knitting Mills misrepresent to the plaintiff the material facts, knowing, or under such circumstances that it ought to have known, the truth, for the purpose of inducing the plaintiff to sell to it the property in question?" The jury answered this question in the negative and left unanswered the question as to whether in making the sale the plaintiff relied upon the representations, if found to have been made. The court rendered judgment for the defendant for a return of the property, with six cents damages; and, in case a delivery could not be had, for the value of the property. From the judgment so entered the plaintiff appealed.

For the appellant there was a brief by *W. E.* and *H. G. Pickering,* attorneys, and *James F. Trottman,* of counsel, and oral argument by *Mr. Trottman.*

For the respondent the cause was submitted on the brief of *H. V. Gard.*

VINJE, J. The main issue in the case was whether or not Sorensen, the president of the Superior Knitting Mills at the time the yarn was purchased, made false and fraudulent representations to Ramien, who acted for plaintiff, as to the financial condition of the Superior Knitting Mills at the time of the sale, the latter testifying that Sorensen represented that its financial condition was the same at the time of the sale as in June previous when the statement to Bradstreet was made. Mr. Sorensen denied that he made any such representations. There being a direct conflict in the testimony upon this issue given by Sorensen and Ramien, the court submitted it to the jury in the question set out in the statement of facts. Objection is made to this question by the plaintiff, and especially because it required the jury to find that the false representations, if any, were made for the purpose of inducing a sale of the goods. The action is one for the rescission of a sale on the ground of fraud. Action-

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able fraud always includes either an actual or a constructive intent to deceive. In the case at bar the dispute was as to whether or not certain false representations as to the solvency of the Superior Knitting Mills were made as testified to by Ramien, the agent of the plaintiff. If made, there could scarcely be ground for finding that they were not made with intent to defraud; so the issue practically narrowed down to the question as to whether or not they were made. The court instructed the jury that the issue was "whether Mr. Sorensen knowingly, or under circumstances such that he ought to have known what the facts were, purposely misrepresented the facts to a material degree, so as to induce the plaintiff to part with its property." There was no claim in the evidence that Mr. Sorensen did not know that the financial condition of the Superior Knitting Mills was different and less favorable at the time of the sale than it was the June previous, and no claim that the representations, if made, were not made for the purpose of inducing a sale. The denial and only denial was the making of such representations at all. It is therefore scarcely believable that the jury would have returned a negative answer to the question had they believed the representations were in fact made. The word "purposely" might not be an appropriate word to use in every case of fraud, especially where only a constructive intent to deceive is shown, but under the evidence and instructions in this case it was not misleading. *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599.

Plaintiff sought to introduce a statement, purporting to have been made June 5, 1912, received by it from a New York credit office as to the solvency of the Superior Knitting Mills, which was substantially the same as the one received in evidence from the Bradstreet Agency except that it said we "will immediately notify you of any material change in our financial condition." The court properly refused to receive it in evidence because it was not the original statement

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claimed to have been sent by the Superior Knitting Mills to the credit agency and no proper foundation was laid for receiving a copy, especially since Sorensen testified that he did not think the Superior Knitting Mills ever made any statement to the agency in question.

Exception is taken to the instruction: "As to this question you are instructed that the burden is upon the plaintiff to establish the affirmative thereof by clear and satisfactory evidence." This related to the issue of fraud and is in harmony with the established rule in such cases. *Klipstein v. Raschein,* 117 Wis. 248, 252, 94 N. W. 63; *Lepley v. Andersen,* 142 Wis. 668, 671, 125 N. W. 433; *Richards v. Millard,* 146 Wis. 552, 555, 131 N. W. 365; *Ball v. Boston,* 153 Wis. 27, 35, 141 N. W. 8. More than a mere preponderance of the evidence is required to establish fraud.

The refusal to grant a new trial on the ground of newly discovered evidence cannot be disturbed because the evidence claimed to have been discovered was the original of the statement to the New York credit office, the copy of which was not admitted by the court. It was the duty of plaintiff to secure such original in time for trial since it had notice of it, or, if it deemed it of any special importance, to have requested a continuance of the case for the purpose of securing it when the court refused to admit the copy. Plaintiff did neither. No doubt the trial court also considered, as we do, that the statement in question had only a remote bearing on the case and that it would have been an abuse of discretion to grant a new trial in order to receive it in evidence.

The other assignments of error are deemed not well taken and of not sufficient importance to merit separate treatment.

By the Court.—Judgment affirmed.

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QUINN, by guardian *ad litem*, Appellant, vs. ROSS MOTOR CAR COMPANY, Respondent.

May 22—June 17, 1914.

Negligence: Degree of care required of child: Instructions to jury: Automobiles: Injury to boy on street: Contributory negligence.

1. Ordinary care in the case of a child is only such care as the great mass of children of his age, intelligence, and experience ordinarily exercise under the same or similar circumstances.
2. It was prejudicial error, in instructing the jury, to apply to a boy thirteen years old, who was struck by an automobile in the street, the tests of ordinary care which are applied to adults.
3. Testing the boy's conduct in such case by the rule applicable to children, the question of his contributory negligence was one for the jury.
4. Findings by the jury that the driver of an automobile, after seeing a boy in the street, failed to exercise ordinary care to avoid injury to him, and that such failure was the proximate cause of an injury to the boy, did not establish a case of gross negligence.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

The plaintiff, a boy thirteen years of age, came into collision with an automobile operated by the defendant's agent and servant, on Belknap street in the city of Superior, at about 5 o'clock p. m. February 26, 1913, and was injured. He was returning home from school and was proceeding westward on Belknap street. He rode about a block with a companion on the back end of a sleigh, and as the sleigh stopped on the south side of the street about fifty feet west of Grand avenue the plaintiff got off from the sleigh and started across the street diagonally in a northeasterly direction and came into collision with the automobile, which was coming from the east.

There was a jury trial. Upon the subject of ordinary

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care the court gave the jury one general definition to the effect that it is such care as the great mass of mankind usually exercise under like or similar circumstances. Upon the eighth question of the special verdict, which covers the question of the plaintiff's alleged contributory negligence, the court instructed the jury as follows:

"You are instructed that in answering this question you will bear in mind that it was plaintiff's duty to make reasonable use of all his senses in order to observe impending danger from approaching vehicles, and if you find from the evidence that plaintiff by such use of his senses could have seen the automobile in time to avoid injury, and failed to use them, then you will answer such question in the affirmative. There is evidence tending to show that plaintiff looked to the east at a time when his view was partially obstructed. If you find that he did so look and that when he looked he did not have a sufficiently clear view of the street for a sufficient distance to the east to discover the approach of vehicles, including automobiles, from which injury might be apprehended, and which might be discovered by the exercise of ordinary care on his part, then you are instructed that it was his duty to again look, when he reached a point in the street when his view in that direction was sufficiently unobstructed to allow him to discover the approach of such vehicle. You are instructed that it is the duty of a person entering upon a city street, and traveling on foot at a point between the regular crosswalks, for the purpose of crossing the street, to look along the street in both directions to ascertain whether any vehicles are approaching, and if so, their rate of speed and how far from the point where the person is crossing the street, even though the travel along such street may be trifling, for the reason that vehicles may be approaching so as to make it dangerous for the foot traveler to proceed."

The special verdict returned by the jury was as follows:

"(1) Was the plaintiff injured in his person by colliding with defendant's automobile on February 26, 1913? *A.* (by the court). Yes.

"(2) Was the car in question, after crossing Grand avenue and before the driver gave it additional speed immedi-

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ately before the accident, if such additional speed was in fact given it, being run at a reckless or greater rate of speed than was reasonable and proper having regard to the width, traffic upon and use of Belknap street in the vicinity of the accident? *A.* Yes.

"(3) If you answer question 2 'Yes,' was such rate of speed a proximate cause of plaintiff's injury? *A.* Yes.

"(4) Did the driver of the car, immediately prior to the accident, fail to exercise ordinary care to observe any person who might be upon the street in front of the car? *A.* Yes.

"(5) If you answer question 4 'Yes,' was such failure a proximate cause of plaintiff's injury? *A.* Yes.

"(6) Did the driver of the car, after seeing plaintiff in the street, fail to exercise ordinary care to avoid injury to plaintiff? *A.* Yes.

"(7) If you answer question 6 'Yes,' was such failure a proximate cause of plaintiff's injury? *A.* Yes.

"(8) Was the plaintiff guilty of any want of ordinary care in the premises that contributed proximately to produce his injury? *A.* Yes.

"(9) What amount of money will reasonably compensate plaintiff for his injury? *A.* $3,000."

Judgment was entered on this verdict in favor of the defendant, and the plaintiff appeals.

W. P. Crawford, for the appellant.

For the respondent there was a brief by *Williams & Stern,* and oral argument by *Burdette Williams.*

WINSLOW, C. J. In this case it is held:

1. Ordinary care in the case of a child like the plaintiff is only such care as the great mass of children of his age, intelligence, and experience ordinarily exercise under the same or similar circumstances. *Briese v. Maechtle,* 146 Wis. 89, 130 N. W. 893. It is error to apply to such children the tests of ordinary care which are applied to adults, and in the present case that error seems clearly prejudicial.

2. In view of the fact that the plaintiff's conduct is to be tested by the rule applicable to children and not by the rule

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applicable to adults, it cannot be said, as contended by the defendant, that the plaintiff was guilty of contributory negligence in this case as a matter of law.

3. Nor can it be held, as contended by the plaintiff, that the answers to questions 6 and 7 of the verdict establish a case of gross negligence.

By the Court.—Judgment reversed, and action remanded for a new trial.

SALUS, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

May 22—June 17, 1914.

Railroads: Injury to employee: Negligence of fellow-servant: Unsafe working place: Direction of verdict.

1. Since the enactment of the Workmen's Compensation Act the defense that an injury to a shop employee was caused by negligence of a fellow-servant is not available to a railway company under sec. 1816, Stats.
2. Neither the common-law rule nor the statutory rule as to the duty of the employer to furnish a safe working place is applicable where the employees, in performing a simple and familiar operation, make their own working place, which is constantly changing.
3. In an action for injuries to a shop employee whose hand was pinched as, with a fellow-servant, he was replacing a truck under the end of an ore car, it is *held* that the evidence does not warrant the disturbing of a verdict directed for defendant on the ground that the injury was a pure accident and that no actionable negligence was shown.
4. In executing the simple ordinary movements required by performance of his duties, one servant may rightfully depend upon his fellow-servants to pay some heed to their own situation.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action to recover for personal injury which happened to plaintiff March 29, 1913.

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On the occasion in question plaintiff and an associate, employees of defendant in the course of their duties as such, were engaged in repairing an ore car. They were required to raise one end of the car with jack-screws free from the truck at such end, roll the truck back and rest the end of the car on a horse, and, after making the necessary repairs, replace the truck. They proceeded to the point of practically returning the truck to its proper location under the car, plaintiff pushing on one side and his associate on the other. It was then brought to a stand, and plaintiff, with his hand resting thereon, looked under the car to observe the exact situation. At that instant his associate, without warning, pushed the truck further under causing plaintiff's hand to be pinched between the car step and the truck, whereby the hand was injured. The claim of plaintiff was that defendant by its co-employee was actionably negligent in moving the truck without giving warning. Defendant took issue with the allegation as to actionable fault, pleaded that plaintiff and his co-laborer were shop employees; that he was only slightly injured; and that the accident happened through his own negligence.

The evidence was to the effect that plaintiff was somewhat injured in substantially the manner set forth in the complaint.

On the trial the court ruled that the whole ground of liability claimed in the complaint was negligence of a fellow-servant. Thereupon counsel for plaintiff asked leave to amend the complaint by alleging actionable liability because of failure to furnish a reasonably safe place for plaintiff to do his work in. Counsel explained that he desired a pleaded basis for a claim that the car was not in a safe position for the work plaintiff was engaged in because it was not raised high enough. The application was denied. The court, on motion, directed a verdict in favor of defendant upon the ground that no actionable negligence of plaintiff's co-em-

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ployee was shown and upon the further ground that if such employee was negligent proximately causing the injury, he being a shop employee, defendant was not liable.

Judgment was rendered accordingly.

For the appellant there was a brief by *W. P. Crawford*, attorney, and *H. G. Pickering*, of counsel, and oral argument by *Mr. Pickering*.

For the respondent the cause was submitted on the brief of *J. A. Murphy*.

MARSHALL, J. So far as the decision below rests upon the theory that the defense of negligence of a fellow-servant was available under sec. 1816, Stats., it is wrong. The statute was superseded by the Workmen's Compensation Act, as held in *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.* 153 Wis. 552, 141 N. W. 1119.

So if appellant was injured by negligence of his associate respondent is liable unless contributory negligence, strictly speaking, on his part,—inadvertence as distinguished from assumption of risk,—proximately contributed to produce the injury. *Besnys v. Herman Zohrlaut L. Co., ante*, p. 203, 147 N. W. 37.

A point is made on the refusal of the trial court to permit an amendment to the complaint so as to specifically charge violation of duty respecting a safe place to work. It is considered that such rule, either under the statutory or common-law duty, has no application here because appellant and his associates necessarily had to and did make their own place to work. The operation the men were engaged in was simple and perfectly familiar to them. The law, severe as it is in respect to the duty of an employer respecting the working place of his employees, still permits him to leave them to make their own working place, as to simple ordinary details, where they are to be provided from time to time and changed at short intervals. It would be utterly impracticable and

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unreasonable to require the employer to be responsible for such a situation at every moment of time and regardless of any actual information as to imperfection, even such as to put him on inquiry in respect to the matter. If the working place in question was unsafe, the employer did not know it, nor had any reasonable ground to know it, and the fault was attributable to appellant himself,—not in the field of assumption of risk but in the distinct field of negligence.

The only other question which seems to be of sufficient importance to call for special notice is as to whether there was evidence tending to show that negligence of appellant's associates was the proximate cause of his injury. True, a question is raised as to the course of examination which the court permitted respondent's counsel to pursue with reference to one of appellant's witnesses. It is mentioned so counsel may not think that it did not challenge our attention. The exact nature of the objections need not be set forth, since in any view we could take of the matter, the examination was either proper or nonprejudicial.

The trial court was of the opinion that there was no negligence of a fellow-servant shown,—that looking at the evidence in the most favorable view for appellant which can be reasonably taken of it, the injury was a pure accident. We are unable to see the contrary with sufficient clearness to warrant condemning the trial court's judgment. The evidence is quite clear that when the truck was moved out from under the car it was found that there was ample clearance therefor. When it was pushed back both of the men had a hand at the matter, appellant pushing on one side and his associate on the other, both bent somewhat forward so as to enable them to sight under the car. It may be that the truck came to a stand and was momentarily started again and unexpectedly to appellant; but there is no satisfactory, if any, evidence, that appellant ordered the truck stopped and that it was again started without orders or warning. He seems to have

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taken hold to help push the truck back after observing that his associate needed help; that he put his hand on the truck at the time and did not change its position until he was injured. It was no part of his associate's business to observe the exact location of his hand. Such associate was bent forward, intent upon his work, and evidently did not notice the position of appellant's hand. He was in the act of moving the truck back to its proper place, as he supposed, and, probably, ready to desist as soon as ordered, or satisfied from his own observation that the proper place had been reached. It does not seem that he had any reason to suppose that his simple act of pushing the truck back as both desired in any way imperiled the personal safety of appellant.

A fellow-servant must be free to execute simple ordinary movements in the performance of his duties and depend upon his associates, in the exercise of like liberty of action, to pay some heed to their own situation. Otherwise all the little accidents which occur from time to time in working operations would be attributable to negligence. There can be no negligence without fault. There can be no fault so long as a person is within the field of what he may rightfully do. Liability of the employer for accidents to employees which are not attributable to negligence of any one, is provided for under the Workmen's Compensation Act; but it does not appear that when the occurrence in question took place respondent had complied with such act. Therefore, appellant is without remedy, since there was no actionable negligence on the part of any one, as the trial court held under such circumstances that we cannot well decide that he was clearly wrong.

By the Court.—The judgment is affirmed.

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GOSCZINSKI, Respondent, vs. CARLSON, Appellant.

May 22—June 17, 1914.

Sheriffs: Shooting to prevent escape of prisoner: When justified: Assault: Liability: Damages: Inadequacy.

1. Neither at common law nor under sec. 4366, Stats., is an officer justified in shooting at a person who, having been arrested on a civil warrant, is attempting to escape from his custody.
2. Where an officer, under those circumstances, discharged his revolver in such a direction that the person attempting to escape was hit, he did so at his peril and, even though he did not intend to shoot such person, his act constituted an assault and rendered him liable for the injuries resulting from the shot.
3. A verdict awarding $70 as damages for an assault by shooting was properly set aside in this case on the ground that the amount awarded was inadequate.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This is an action by the plaintiff to recover damages for an alleged unlawful and wilful assault by the defendant upon the plaintiff without excuse or justification. The plaintiff claims that he was seriously injured by a shot in his back from a revolver discharged by the defendant, to his damage in the sum of $2,500. The defendant answered alleging that at the time of the alleged assault and shooting he was the undersheriff of Douglas county, and that on August 29, 1911, a summons, complaint, affidavit, undertaking, and order of arrest in a civil action wherein the plaintiff was defendant were delivered to the sheriff of Douglas county and that he was directed by the sheriff to execute the process and arrest the plaintiff. It is further alleged that the defendant on August 30, 1911, arrested the plaintiff and took him into custody by virtue of such warrant and undertook to convey him to the county jail; that the plaintiff wrongfully resisted the defendant in the execution of such court process and by

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physical violence attempted to escape from the defendant's custody; that the defendant endeavored to prevent the plaintiff from escaping and make him submit to the defendant's authority and custody by discharging his revolver without any intent to shoot or injure him; that he with due care discharged the revolver in a direction calculated not to hit, wound, or injure the plaintiff, but only to frighten him into submission and prevent his escape.

It appeared at the trial that after the defendant had arrested the plaintiff under the process in his hands and while he was conveying him to the county jail, when informed that he would have to remain in jail for several months unless he gave a bond in the sum of $600 for his release, the plaintiff started to run and attempted to escape from the defendant's custody, and that the defendant discharged his revolver twice with the intent to frighten the plaintiff into submission and to regain custody of him; that the second shot hit the plaintiff, penetrating his shoulder, and passed into vital parts of his body; that the plaintiff thereafter traveled a short distance, when he was retaken into the defendant's custody, who procured a doctor and took the plaintiff in a conveyance to a hospital, where he received treatment and hospital care for about three and one-half months. The plaintiff also testified that he was unable to perform any labor until May, 1912, when he did dishwashing in a hotel and other light work for a period of about four months, when he engaged in labor at ore docks and driving teams up to the time of trial. The court held as a matter of law that the defendant did not intend to shoot and injure the plaintiff at the time he discharged his revolver; that he was liable to the plaintiff for compensatory damages, and submitted the assessment of the amount of damages to the jury, and the jury returned a verdict awarding the plaintiff $70 damages.

The plaintiff moved to set aside the verdict upon the grounds that the verdict was perverse and that the damages

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awarded were inadequate. The court ordered the verdict to be set aside upon the ground that the damages awarded were inadequate, and granted a new trial upon the condition that the defendant have an option to elect, within thirty days thereafter, to allow judgment to be entered against him for the sum of $250 and costs, and in case the defendant so elected the motion for a new trial was to stand denied. This is an appeal from such order.

For the appellant there was a brief by *W. P. Crawford,* and oral argument by *H. G. Pickering.*

For the respondent there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *George B. Hudnall.*

SIEBECKER, J. The defendant contends that the court erred in granting the plaintiff's motion for a new trial for inadequacy of the damages awarded the plaintiff by the jury. The argument is made by the defendant that the award of $70 damages is satisfactory to the defendant and should not be disturbed, because under the evidence as shown by the record on this appeal the plaintiff was not legally entitled to recover any damages, and hence the verdict awarding the plaintiff $70 damages should not be disturbed on the plaintiff's request and against the defendant's protest. Assuming the verdict as one in defendant's favor, did the court err in ordering a new trial? The claim is made that since the court held as a matter of law that defendant, in discharging his revolver under the circumstances shown by the evidence, entertained no purpose to shoot the plaintiff or inflict on him any personal injury, there is no liability for the accidental injury resulting to the plaintiff from the shooting. This claim is based on the ground that the defendant was justified in doing what he did in the execution of the legal process in his hands and in retaking the plaintiff into his custody after he escaped from the defendant while conducting him to the county jail pursuant to the warrant of arrest under which

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he was acting. Defendant's counsel relies on the provisions of sec. 4366, Stats. From the context of the provisions of this statute it is manifest that they are intended to apply only to justifiable homicides when necessarily committed by public officers in obedience to any judgment of a competent court, in cases of actual resistance to the execution of legal process, or discharge of any other legal duty, or the retaking of felons or arresting them when fleeing from justice. The statute must be interpreted in the light of its contents and the acts to which it was clearly intended to apply. It is apparent that a public officer cannot justify the use of means dangerous to human life unless the law imposed it as a *necessity* in the execution of legal process. The statute is declaratory of what had been established as a rule at common law as to justifiable conduct of public officers in the execution of legal process. Under the rules of the common law officers were not justified in shooting persons attempting to escape from their custody in case of arrests for a misdemeanor or under civil warrants, for the purpose of compelling submission to their authority and retaking them into custody. In *U. S. v. Clark,* 31 Fed. 710, Mr. Justice BROWN declared the common-law rule on the subject in the following language:

"The general rule is well settled, by elementary writers upon criminal law, that an officer having custody of a person charged with felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he be charged simply with a misdemeanor; the theory of the law being that it is better that a misdemeanant escape than that human life be taken."

In the case of *Thomas v. Kinkead,* 55 Ark. 502, 18 S. W. 854, the court entered upon an elaborate discussion and extensive examination of the subject in an action wherein the defendant was sued for damages for an unjustifiable shooting and killing of a person charged with the commission of a misdemeanor to prevent his resistance to and escape from arrest.

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After a thorough review of the adjudications and the text-writers the court states the rule of the common law to be:

"In making the arrest or preventing the escape the officer may exert such physical force as is necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself."

The same rule was applied in *State v. Sigman,* 106 N. C. 728, 11 S. E. 520, where the officer was held criminally liable for an assault with a deadly weapon, for discharging a pistol at a person arrested for a misdemeanor who had escaped and was fleeing to avoid being retaken. The general rule is that shooting at a person in an endeavor to arrest or retake a person who has escaped from arrest for a misdemeanor is excessive force constituting an assault. The following cases and the cases therein cited support this rule: *Brown v. Weaver,* 76 Miss. 7, 23 South. 388, 42 L. R. A. 423; *Reneau v. State,* 2 Lea, 720; *Clements v. State,* 50 Ala. 117; *Sossamon v. Cruse,* 133 N. C. 470, 45 S. E. 757.

Reason and authority make this rule applicable in cases of the execution of civil warrants for the arrest of persons. We are of the opinion that sec. 4366, Stats., does not abrogate this common-law rule on the subject here under consideration. We conclude that the trial court properly held that when the defendant discharged his revolver in a direction so as to hit the plaintiff he did so at his peril; that under the circumstances it was not justifiable and constituted an assault, and hence he is liable in damages to the plaintiff for the injuries resulting from the shot. Under this view it was proper for the trial court to award a new trial on the ground that the amount awarded is inadequate. The record is silent as to the defendant's election to permit judgment to be entered against him for the amount fixed by the court and no question

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is raised respecting the action of the trial court in this respect. The record presents no other material question that need be considered on this appeal from the order granting a new trial in the action.

By the Court.—The order appealed from is affirmed, and the cause remanded for further proceedings according to law.

BELSTNER, Administratrix, Respondent, vs. TOWN OF SUMNER, Appellant.

May 22—June 17, 1914.

Highways: Defect causing death: Spinal meningitis as result of fall: Proximate cause: Instructions to jury: Excessive damages.

1. In an action for the death of plaintiff's intestate, alleged to have been caused by injuries received when he fell from a wagon by reason of a defect in a highway, the evidence (consisting largely of the opinions of medical experts) was sufficient to make it a jury question whether the cerebro-spinal meningitis of which he died resulted from such fall.
2. In case of a special verdict, a general instruction touching the general question of the right of recovery has no proper place in the charge.
3. An award of $5,000 for the death of a workingman forty-nine years old is *held* excessive, where the evidence showed that he left a widow but no other dependents, that he was always in good health and could earn "good wages," but did not show how much he earned or could earn *per diem* or that he had accumulated or would have been likely to accumulate any property. An option is given to take judgment for $3,000.

SIEBECKER and TIMLIN, JJ., dissent in part.

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This action was brought to recover damages for the death of George Belstner, the husband of the plaintiff, whose death is claimed to have been caused by injuries resulting from a

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fall from a wagon while riding on a defective highway in the defendant town. The deceased was sitting on the rear seat of a milk wagon at the time of the accident. The wagon struck a ledge of rock in the highway and the deceased was thrown backward to the ground, striking on his head. He worked for three days thereafter, but was unable to work any longer, and died two days later of cerebro-spinal meningitis. The jury returned the following special verdict:

"(1) Did George Belstner's death result from an injury received by him in falling out of a wagon and striking on his head in a public highway at the time and place alleged in the complaint? *A.* Yes.

"(2) Was the highway in question, at the time and place of the injury, in an unsafe condition for use by persons exercising ordinary care? *A.* Yes.

"(3) If you answer the second question in the affirmative, then answer this: Had such unsafe condition existed a sufficient length of time prior to the injury that the town, in the exercise of ordinary care on part of its officers having charge of its highways, ought to have discovered such unsafe condition in time to have repaired it, if they acted with reasonable promptness? *A.* Yes.

"(4) If you answer the second question in the affirmative, then answer also this: Was such unsafe condition of said highway the proximate cause of the injury? *A.* Yes.

"(5) Did any want of ordinary care on the part of the deceased proximately contribute to produce the injury? *A.* No.

"(6) What sum of money will compensate the plaintiff for the damages she sustained by reason of the death of George Belstner? *A.* $5,000."

Judgment for the plaintiff was entered on the verdict, and the defendant appeals.

L. B. Caswell, for the appellant.

Frank H. Rogers, attorney, and *R. B. Kirkland,* counsel, for the respondent.

WINSLOW, C. J. The verdict in this case is amply sufficient to sustain the judgment. If the findings of the verdict

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are sustained by sufficient evidence and there are no substantial errors in the charge of the court or the rulings and evidence, the judgment must be affirmed, unless, indeed, the damages be excessive.

The appellant claims in substance that (1) there is no proof that the spinal meningitis resulted from the fall from the wagon; (2) that there was no actionable defect in the highway shown; (3) if there was a defect it had not existed long enough to charge the town officers with notice of its existence; (4) instructions on the subject of proximate cause were erroneously refused; (5) the deceased was guilty of contributory negligence; (6) the damages are excessive.

It is not deemed profitable or necessary to enter into any discussion of the second, third, and fifth of these claims. Examination of the evidence shows very clearly that all of these questions were questions for the jury upon the evidence and that they were properly submitted, or at least without any substantial error.

As to the first question the result is not so obvious, but we have come to the conclusion that the evidence was sufficient to carry the case to the jury. The fact that cerebro-spinal meningitis sometimes results directly from trauma, or physical injury, seems to be well supported by the evidence of physicians. Whether it did so result in this case was a question which depended principally upon the opinions of the expert witnesses, and those opinions were necessarily founded upon hypothetical questions involving the history of the accident and of the condition of the patient prior to his calling a physician on Wednesday. There was, of course, a radical disagreement between the conclusions reached by the physicians, but two of them certainly gave evidence on the subject tending to support the conclusions of the jury. When it is remembered also that the illness of the deceased followed closely upon the injury with no apparent intervening cause, and that he had been up to that time in perfect health for

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years, we think it clear that the evidence was sufficient to take the case to the jury. Complaint is made as to the form of the hypothetical question put to the plaintiff's medical witnesses, in that it stated as facts some particulars which the evidence did not substantiate. It must be admitted that the question was not entirely accurate. We do not think, however, that the inaccuracy was of sufficient importance to be considered substantial and it is not considered necessary to state it in detail.

The subject of proximate cause was fairly covered by the fourth question of the special verdict, and in charging the jury on this question the court gave the correct definition of proximate cause and went no further. The defendant requested an instruction to the effect that if there were two proximate causes, one a defect in the road and the other want of ordinary care on the part of the deceased, "the plaintiff cannot recover." This instruction was refused by the court and the defendant now complains of this refusal. The ruling was correct. In case of a special verdict, a general instruction touching the general question of the right of recovery has no proper place in the charge. *Johnson v. St. Paul & W. C. Co.* 126 Wis. 492, 105 N. W. 1048.

We think, however, the damages must be considered as excessive in view of the meagerness of the evidence as to the earning capacity of the deceased. Substantially the only facts proven bearing on the question were that the deceased was a strong, able-bodied man, forty-nine years of age, weighing 180 pounds, who had always been in good health and could always earn good wages; that he had been working before his illness for some time at the shop of the Creamery Package Company at Fort Atkinson, running a machine; that he was a steady worker, was the sole means of support of his wife, and that he had no children. The evidence fails to show how much the deceased earned or could earn *per diem,* or whether there was any reasonable probability of his ac-

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cumulating property or doing more than furnishing his wife the bare means of subsistence. We have no means of ascertaining what was meant by the words "good wages." These words are relative, not absolute, and may mean much or little according to the viewpoint of the person who uses them. There is no hint in the evidence that the deceased at the age of forty-nine had been able to accumulate a dollar's worth of property. The inference must naturally be that his daily wage cannot have been large, especially in view of the proof that he was a steady worker. In the present case the sole beneficiary is his widow, and she had the right unquestionably to expect her support during the expectancy of life of the deceased. In cannot be reasonably anticipated, however, in view of the evidence, that this support would have been anything more than the mere necessaries of life in a very humble station. In view of this situation the damages seem to us to be plainly excessive. While we must reverse for this, we shall, as is our usual custom, allow the plaintiff to elect to take judgment for the smallest sum which in our judgment a fair and just jury would in all reasonable probability render on the evidence. That sum in this case is $3,000.

By the Court.—Judgment reversed, and action remanded for a new trial, unless the plaintiff within thirty days after the filing of the *remittitur* in the court below shall elect in writing to take judgment for $3,000 and costs, in which case the trial court is to render judgment for the plaintiff in accordance therewith.

SIEBECKER, J., dissents as to reduction of damages.

TIMLIN, J. (*dissenting in part*). Plaintiff, widow and administratrix of the estate of George Belstner, brings this action against the defendant for damages accruing to her on account of the death of her husband, caused, it is claimed, by

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a defective highway which the defendant negligently allowed to remain in that condition. Evidence tends to show that at a point where the highway passed through a rock cut some quarrying was done which left part of the roadbed about three feet lower than the remainder, and an almost perpendicular wall of rock about three feet in height and extending diagonally across the roadbed marked the junction of the higher and lower levels of the road. To make this available for travel the lower portion was so filled up with earth as to make a slanting ascent to the higher level. The drainage from this clay filling was imperfect or nonexistent, so that in wet weather it became soft mud and gave way under the wheels of passing vehicles, while the rock of course remained, thus causing a severe jolt to vehicles passing over. Apprehending danger from some recent experiences with other travelers, a few days before the accident a neighboring farmer, a former road overseer of the defendant, hauled in a load of soft earth and dumped it on top of the former fill and close to the rock ledge so as to break the force of contact with the perpendicular rock, and with this last fill the crossing ledge projected about two inches over the soft clay.

There is ample proof of notice to the town and of such long-continued insufficiency of the highway in the particulars aforesaid that the town, in the exercise of ordinary care, should have discovered and remedied the defect. There is also evidence from which the jury was authorized to find the existence of an actionable defect or insufficiency under the statute. Sec. 1339, Stats. 1913.

It is argued that the court should have directed the jury to return a verdict for defendant because there is no evidence tending to show that the death of George was caused by the defect or insufficiency of the highway. On Sunday afternoon, July 21st, deceased was riding in a wagon driven by another on the highway, and when this point was reached the wagon gave a severe jolt and threw him out on the road. He

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landed on his head with force, indicated by the crushing and tearing of his hat and by his exclamation to the effect that he thought his neck was broken, he had heard it crack. He complained of pain in his neck on the way home from the place of accident, but on Monday morning went to work at his usual occupation of machine operator in a manufactory. There is no evidence of further complaint or suffering until Tuesday noon, when he informed the foreman of illness and that unless he felt better he would not return to work the next day. He did, however, return to work on Wednesday and worked something more than half a day, then went home sick. Dr. Bennett came to see him on Thursday and found him suffering from a difficulty which the doctor termed "inflammation of the brain and cord, meningitis." He gave the doctor a narrative to aid the latter in diagnosis. He died the next day. This doctor testified that the conditions he found existing could have been brought about by the fall described. See cases cited in *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, at pp. 610, 611 (120 N. W. 518), and also *Otto v. M. N. R. Co.* 148 Wis. 54, 60, 134 N. W. 157. Dr. Smith in answer to an hypothetical question testified in substance that in his opinion the condition termed by Dr. Bennett meningitis was caused by the fall and that he would have no doubt that this was the cause. It is said that meningitis is a germ or bacterial disease, that it attacks strong and apparently well persons without any known cause, and is quite mysterious in its origin, all of which may be conceded. But the term is also apparently used to indicate any inflammation of the meninges or membrane which incloses the spinal cord and brain. There are so many unsolved and doubtful problems relating to the bacterial origin of diseases and the habitat of the bacteria prior to the advent of the disease that it would not be either modest or wise to pronounce definitely upon such questions as legal questions. Absolute certainty of the cause of death usually is unattainable, and the best that can be expected

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is a high degree of probability. Up to the time of the accident the deceased had been in good health. The fall was a severe one, death followed within five days, and from the time of the fall until death symptomatic observation indicated an injury to the vertebræ of the neck. This, added to the opinions of the qualified physicians, which are not incredible or extravagant, makes out a case from which the jury might find the death was caused by the defect in the highway.

The defendant requested an instruction to the effect that the plaintiff must prove by a preponderance of the evidence that the fall from the wagon was the cause of the death. This the court refused, but a question of the special verdict asked: "Did George Belstner's death result from an injury received by him in falling out of a wagon and striking upon his head in a public highway, at the time and place alleged in the complaint?" He instructed the jury that: "The burden of proof as to each of said questions is upon the affirmative of the question, and you should, therefore, not answer either question in the affirmative, unless you are satisfied from a preponderance of the evidence, to a reasonable certainty, that they should be so answered." The requested instruction was therefore sufficiently covered by the general charge and no error resulted from its refusal.

It is contended that the damages of $5,000 are excessive. There was evidence that the deceased was married, childless, aged forty-nine years, in good health, faithful and industrious at his work, and his last employer testified that during two and a half years' employment he had not lost a day from sickness. The only evidence of his earning capacity is that he operated some sort of a machine in a factory and "earned good wages." This omission to prove what he earned and what his habits of thrift were and what property, if any, he had accumulated was quite a serious oversight. There is evidence that deceased had been married twenty years and that his widow has no property and that he was her sole

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means of support, but there is nothing to show how old she is. There is nothing upon which to base a recovery for the loss of probable future accumulations of property; rather the contrary is suggested. We do not know what is considered "good wages" for an operator upon this undescribed machine. It might perhaps be assumed that he received at least the wages of an ordinary laborer, and we might take judicial notice that these are from $1.50 to $2.50 per day, depending upon season and locality. But we do not know the wages in this locality. We might perhaps also take judicial notice of his expectancy of life according to the tables mentioned in sec. 3871*m*, Stats. 1913, relating to dower. But we do not know the widow's age, we do not know what number of days in a year he was accustomed to work, nor what proportion of his wages went for his personal expenses. In this evidence there can be found no basis upon which either the jury or this court can properly estimate plaintiff's damages. *Sweet v. C. & N. W. R. Co.* 157 Wis. 400, 147 N. W. 1054, and authorities cited. This opinion last cited received the unanimous approval of this court, as I understand it. If such evidence sustains a recovery for any sum it sustains a five thousand dollar recovery just as well as it sustains a three thousand dollar recovery. The notion that indefinite evidence pointing to no ascertainable amount will sustain a verdict for $3,000 but not one for $5,000, and that evidence insufficient to support a verdict of the jury because of indefiniteness is nevertheless sufficient to support a verdict of this court on the question of damages, seems to me quite illogical. The plaintiff has a constitutional right to have these damages fixed by a jury. Const. art. I, sec. 5. If the evidence pointed to a somewhat definite amount less than that fixed by the jury, then perhaps this court could act by fixing what it considered the maximum amount which a fair jury would ordinarily give on this evidence, and give the plaintiff the option to accept that amount or submit to a new trial.

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But that is not the case here. I believe the constitution is binding, not only upon the legislature, but also upon this court, and if "right of trial by jury shall remain inviolate" the plaintiff has a right to have her damages fixed by jury and not by this court, except in such cases where the verdict of the jury is impeached by the evidence given in the case, and in the latter case the amount of recovery approved by this court must rest upon evidence, not upon mere conjecture. When in the future there shall come to this court the verdict of a jury in a like case for the amount fixed by this court and resting upon like evidence or lack of evidence, it should be affirmed if the rule here established is to prevail.

BAIRD, Appellant, vs. CARLE, Respondent.

May 22—June 17, 1914.

Husband and wife: Alienation of wife's affections: Justification: Right of brother to advise her: Pleading: Presumptions: Burden of proving malice: Evidence: Competency: Communications to brother by physician and attorney: Instructions to jury: Harmless errors.

1. A brother has the right to advise a married sister to discontinue her marital relations with her husband if he honestly believes that conditions are such as to demand separation, provided he acts in good faith and has substantial reasons for believing that the advice given is proper.
2. If in such a case separation ensues and the husband brings an action for alienation of his wife's affections, he must allege, and the burden is upon him to show, that the advice which tended to bring about the separation was given maliciously and in bad faith.
3. Where in such a case plaintiff alleged and attempted to prove that the defendant brother acted in bad faith and from malicious motives, defendant had the right to prove facts in justification under the rule above stated, although he did not plead justification.
4. Defendant was properly permitted in such a case to testify to

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communications made to him, before he advised the separation, by a physician and a lawyer whom his sister had consulted in the matter. The admissibility of such testimony does not involve any question as to whether such physician or lawyer would be a competent witness upon the trial, nor as to the accuracy or correctness of the information given by them to defendant, provided it was such that he might reasonably rely thereon.

5. In an instruction to the jury, in such case, that the mere fact that defendant "induced or enticed" his sister "to live apart from her husband, and that they had previously lived happily together, is not sufficient to make him liable or to raise a presumption that his motive was malicious, as would be the case if he were a stranger to" the wife, the use of the word "enticed" was unfortunate, but when the quoted sentence is taken in connection with what preceded and what followed it, the instruction was not likely to be misleading; and in view of the evidence the error, if any, was not prejudicial.

6. Requested instructions in such case, to the effect that it is not necessary to the right of action that defendant's conduct be the sole cause of the alienation, but it is sufficient if his conduct was the controlling cause, and that evidence of indifference or cruelty of the husband to the wife prior to the alienation and of the unhappiness of their domestic relations only goes to the mitigation of damages and not to a justification of a malicious act of the defendant in causing the separation, were correct and might properly have been given; but, the evidence that defendant acted either maliciously or in bad faith being very slight, the refusal of such instructions was not prejudicial error.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the briefs of *Edgar L. Wood,* and for the respondent on that of *Jeffris, Mouat, Oestreich & Avery.*

BARNES, J. This action is brought by the plaintiff to recover damages for the alienation of his wife's affections, against the defendant, who is a brother of plaintiff's wife. It was submitted to the jury on a general verdict by which the

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jury found for the defendant, and from a judgment entered thereon plaintiff appeals. The errors assigned are on the erroneous admission of evidence, on the charge of the court to the jury, and on the refusal of the court to charge as requested by the plaintiff.

It was held by this court in *Jones v. Monson,* 137 Wis. 478, 488, 119 N. W. 179, that parents have the right to advise their married daughters to discontinue their marital relations with their husbands if they honestly believe that conditions are such as to demand separation, provided they act in good faith and have substantial reasons for believing that the advice given is proper. It is also held in that case that if separation ensues and the husband brings an action to recover damages for the alienation of the affections of the wife, the burden is on him to show that the advice which tended to bring about the separation was given maliciously and in bad faith. The weight of authority elsewhere is to the effect that this rule also extends to a brother or other near relatives of the wife. *Powell v. Benthall,* 136 N. C. 145, 48 S. E. 598; *Trumbull v. Trumbull,* 71 Neb. 186, 98 N. W. 683; *Luick v. Arends,* 21 N. Dak. 614, 132 N. W. 353, 365, and cases cited; *Bailey v. Kennedy,* 148 Iowa, 715, 126 N. W. 181. This rule is not only humane, but a contrary one would be almost intolerable.

We entertain no doubt that the rule of *Jones v. Monson, supra,* held applicable to parents should also extend to a brother.

The first assignment of error argued is that the court was wrong in permitting the defendant to show facts in justification of his conduct without having pleaded justification. The assignment is not well made under the rule of law which we adopt. It was incumbent upon the plaintiff to allege that the defendant acted in bad faith and from malicious motives. It was so alleged in the complaint. It was necessary for the

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plaintiff to prove this allegation in order to make a case, and he did attempt to prove it. The allegation was denied in the answer. On the issue thus made, the defendant had the right to offer any competent proof which would tend to show that he was actuated by good motives and not by malice, and that he had reasonable ground for believing that the advice which he gave his sister was entirely proper under the circumstances.

The plaintiff and his wife were married at Janesville in July, 1910, and immediately went to California to reside. About October 10, 1910, the wife left her husband, ostensibly to pay a visit to her brother at Janesville, Wisconsin. She was apparently timid about talking with her brother about her aversion to her husband. It appears that she consulted a physician at Janesville. In her talk with her physician, Dr. Van Kirk, she told some things which rendered it inadvisable for her to return to and live with the plaintiff. She also advised him that she had not told her brother because she was afraid that he would insist on her going back to California to her husband. The doctor conveyed to the defendant the substance of his conversation with Mrs. Baird. Among other things he said she told him that she would rather be dead than go back to California, and that she wanted the doctor to talk with her brother about the matter.

Mrs. Baird also communicated with Mr. Jeffris, one of the defendant's attorneys in the present action, and related to him her objections to living with her husband. Mr. Jeffris communicated this information to the defendant. After these communications were made, the defendant had a talk with his sister in which she related to him what she had already told Dr. Van Kirk and Mr. Jeffris.

On the trial the defendant was permitted to testify to what Dr. Van Kirk communicated to him and also to what Mr. Jeffris told him, and likewise to the facts or alleged facts detailed to him by his sister. It is insisted that it was error

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to admit this evidence because the communications between Mrs. Baird and her physician and lawyer were privileged, and because statements made by her could not be received in evidence against her husband.

The evidence was properly admitted. The defendant had the right to advise his sister, provided he acted upon reasonable information and in good faith. In that event he had a complete defense to the action, which would be entirely unavailing to him if he were unable to show the information which he received and the sources from which it came. We do not know of any information that a relative would be more likely to act upon than that conveyed by a doctor or a lawyer in a case of this kind. The question as to whether these parties would be competent witnesses on the trial is not at all involved. Neither is the accuracy or correctness of the information given of any consequence, provided it was such that the defendant might reasonably rely thereon. As a matter of fact on the statement of the physician the information which he communicated to the defendant was not privileged, and the wife, having requested that the information be communicated to her brother, consented that it might be disclosed. In reference to the statements made by the sister to the defendant, it is claimed that they were not competent because made after the brother had actually induced his sister to separate from her husband. The defendant, however, insisted that he neither counseled nor advised any separation until after he received the communications from the doctor and the attorney and talked with his sister in reference thereto. He had the right to present his case to the jury upon the facts as he claimed them to be, and on his evidence he might rely on the alleged facts related to him by his sister in advising her as he did.

A number of errors are assigned and argued on the charge of the court. We do not deem it necessary to consider them

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in detail. Some of them are eliminated by the view of the court to the effect that the burden of proving malice and bad faith was on the plaintiff.

The most substantial assignment of error is on the following portion of an instruction which was given:

"The mere fact, if you should find it to be a fact, that he induced or enticed Mrs. Baird to live apart from her husband, and that they had previously lived happily together, is not sufficient to make him liable or to raise a presumption that his motive was malicious, as would be the case if he were a stranger to Mrs. Baird."

The particular objection to this instruction is in the use of the word "enticed." The choice of this word was not fortunate. The word "enticed" may be used in a harmless sense, but is usually used to denote meretricious conduct. The sentence is one culled from a lengthy instruction intended to define the legal rights of the defendant in the premises. Taken in connection with what precedes and also what follows it, we think it is unlikely that the jury were misled. They were told that if they were satisfied to a reasonable certainty that the defendant induced or enticed Mrs. Baird to leave her husband, they must then determine whether the defendant in doing so "acted from malicious motives, that is, not in good faith with the sole desire to promote his sister's happiness and welfare."

The court then proceeds to differentiate between advice given by a near relative and that given by a mere stranger, and it is probable that, taken as a whole, it would be understood by the jury to mean that they must find for the plaintiff if satisfied that the defendant actually induced his sister not to live with the plaintiff and that in so doing he acted in bad faith and from malicious motives. If it be said that the instruction is technically incorrect, it should not be held to be reversible error in this case for reasons that will be stated later on.

The court further instructed the jury that the presump-

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tion was that the defendant acted in good faith and not maliciously. This is entirely in harmony with what was decided in *Jones v. Monson,* 137 Wis. 478, 119 N. W. 179, and was a correct statement of the law as applied to a near relative such as a brother.

The plaintiff asked that some sixteen different instructions be given to the jury which were refused by the court.

The following requested instructions were correct and might well have been given:

"9. It is not necessary in order to confer a right of action that the defendant's conduct be the sole cause of the alienation or separation. It is sufficient if the conduct of the defendant was the controlling cause."

"13. Evidence tending to show indifference or cruelty of the husband to his wife prior to the alienation and of the unhappiness of their domestic relations only goes to the mitigation of damages and not to a justification of the wilful acts, if you find there is a malicious act of the defendant in causing the separation, if you find he did cause it."

The error of the court, if it was an error, in using the word "enticed" as hereinbefore stated, or in failing to give the instructions above quoted, should not be considered prejudicial error. We have read the evidence in the case, and, while it was proper enough to submit the case to the jury, as a matter of fact the evidence to show that the defendant acted either maliciously or in bad faith is very slight indeed. When its unconvincing character is considered in connection with the evidence offered by the defendant and the explanations made by him as to certain transactions which it is claimed tended to show bad faith, it is wholly improbable that any jury on the same evidence would return a different verdict if the instructions given had been full, accurate, and correct in every particular. This being the case, the judgment should not be interfered with.

By the Court.—Judgment affirmed.

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RIX, Respondent, vs. SPRAGUE CANNING MACHINERY COMPANY, Appellant.

May 22—June 17, 1914.

Appealable orders: Summons: Validity of service on nonresident necessarily in court.

1. A motion made by defendant, after a judgment by default, to set aside the service of the summons and all subsequent proceedings on the ground that the service was void, is in effect a summary application made after judgment to vacate it for want of jurisdiction, and an order denying such motion is appealable under sub. 2, sec. 3069, Stats.
2. A witness or a party from another state necessarily present and in attendance upon a court within this state, and present for such purpose only, is privileged from the service of a summons while so necessarily within the state; and a service made upon him under such circumstances is void.

APPEAL from an order of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The defendant, a foreign corporation, made a motion after a judgment of default had been entered against it to set aside the service of the summons in the action and all proceedings subsequent thereto on the ground that the service was void. From an order denying the motion it appealed.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* and a supplementary brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, and oral argument by *Mr. Stebbins.*

For the respondent the cause was submitted on the brief of *Sawyer & Sawyer.*

VINJE, J. 1. Respondent questions the appealability of the order. An order made before judgment refusing to set aside the service of a summons is not appealable. *Latimer v. Central E. Co.* 101 Wis. 310, 77 N. W. 155; *Welsher v. Libby, McNeil & Libby,* 106 Wis. 291, 82 N. W. 143.

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Neither can its validity be tested by a writ of error (*Paine v. Chase,* 14 Wis. 653), for that can be brought only on a judgment or on an award in the nature of a judgment (*Wheeler v. Scott,* 3 Wis. 362), and an appeal from a judgment constitutes a general appearance. *Barnum v. Fitzpatrick,* 11 Wis. 81; *Ruthe v. G. B. & M. R. Co.* 37 Wis. 344; *Washburn v. Washburn W. Co.* 120 Wis. 575, 98 N. W. 539. A special appearance for the purpose of moving for a change of venue waives defective service. *State ex rel. Engle v. Hilgendorf,* 136 Wis. 21, 116 N. W. 848. So does a special appearance for the purpose of amending the return of service (*Bestor v. Inter-County Fair,* 135 Wis. 339, 115 N. W. 809); or any motion asking for partial or entire relief which is consistent only with the fact of jurisdiction and which implies it in its consideration. *Blackburn v. Sweet,* 38 Wis. 578. Thus a motion to set aside a judgment for defective service and for irregularities not jurisdictional is held to be a general appearance, though the motion recites the appearance is special. *Grantier v. Rosecrance,* 27 Wis. 488; *Anderson v. Coburn,* 27 Wis. 558; *Alderson v. White,* 32 Wis. 308. This court will not, under its power of superintending control, review an order made before judgment refusing to vacate the service of a summons. *In re Pierce-Arrow M. C. Co.* 143 Wis. 282, 127 N. W. 998. It thus appears that a defendant who claims defective service of a summons must either stay out of court entirely after his application to the trial court to set aside the service has been denied or else waive the right to have such question passed upon by appeal, unless it can be tested by an appeal from an order made after judgment as is sought to be done in this case. The right of appeal is purely statutory. It is manifest that the order under consideration, if embraced within the provisions of sec. 3069, Stats., relating to appealable orders, must come under the second subdivision thereof, providing that a final order affecting a substantial right made upon a summary ap-

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plication in an action after judgment is appealable. While such orders usually relate to proceedings or matters taking place subsequent to the entry of the judgment, or to the granting or denying additional relief at the foot thereof, or to the taking of an appeal therefrom, no good reason is perceived for limiting them entirely thereto—especially when such construction would deprive a litigant of the right either to question the fact of jurisdiction or else to question the merits of a judgment. The language of the statute is broad enough to include the order appealed from, and every consideration having in view the protection of substantial rights of litigants favors its inclusion.

The motion in this case was in effect a summary application made after judgment to vacate it for want of jurisdiction due to defective service. True, the question raised could have been tested in the trial court before judgment, but under our statute and decisions, if so tested there, no appeal could have been maintained in this court to review the correctness of the ruling of the trial court thereon. And while it is true, as stated by counsel for appellant, that the question raised by the motion relates back to proceedings before judgment and challenges the correctness of such proceedings, and is in substance the same as a motion made before judgment, still in terms it can, without any violence to language, be held to be different and to be included within the provisions of the second subdivision of sec. 3069 as a summary application made after judgment to challenge the correctness of a ruling affecting a substantial right of a litigant that can be tested on appeal in no other manner. By so treating it, a litigant may have a ruling by this court upon the question of jurisdiction without forfeiting his right to challenge the merits of the judgment, thus protecting a substantial right without conflicting either with the language of the statute or with previous decisions. We therefore hold the order appealable.

2. Was there a valid service of the summons? It appears

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that the summons was served upon the secretary of the defendant, L. A. Babcock, while he was necessarily in attendance upon the trial court as a witness therein in another action wherein this defendant was plaintiff and the Hartford Canning Company was defendant, and was within this state for no other purpose. The order refusing to set aside the service so recites and the facts therein stated must be deemed verities. A service made under such circumstances is void. A witness or a party from another state necessarily present and in attendance upon a court within this state and present for such purpose only, is privileged from the service of a summons while so necessarily within the state. *Cameron v. Roberts,* 87 Wis. 291, 58 N. W. 376; *Matthews v. Tufts,* 87 N. Y. 568; *Mullen v. Sanborn,* 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721 and note; *Long v. Hawken,* 114 Md. 234, 79 Atl. 190, 42 L. R. A. N. S. 1101 and note; *Mitchell v. Huron Circuit Judge,* 53 Mich. 541, 19 N. W. 176; *Letherby v. Shaver,* 73 Mich. 500 (*Shaver v. Letherby,* 41 N. W. 677); *Cooper v. Wyman,* 122 N. C. 784, 29 S. E. 947; *First Nat. Bank v. Ames,* 39 Minn. 179, 39 N. W. 308. The exemption is primarily for the protection of the due administration of justice; so that suitors and witnesses can freely attend court without the penalty of thereby incurring any liability which would otherwise not have been incurred. The fact that it may also benefit the suitor or witness is a mere incident of its main purpose.

By the Court.—Order reversed, and cause remanded with directions to enter an order setting aside the service of the summons in the action and all subsequent proceedings therein.

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ESTATE OF RYAN: MERTON, Respondent, vs. PUFFER, Executor, Appellant.

May 22—June 17, 1914.

Judgment: Res judicata: *Partnership: Contribution based on illegal act: Attorneys at law: Settlement of partnership affairs: Witnesses: Competency: Transaction with person since deceased: Executors and administrators: Claims: Time for presentation.*

1. To render the judgment in one case *res judicata* as to the rights of the parties in another case upon a different cause of action, it must appear that the questions were actually litigated and decided in the former case.
2. The principle that there can be no contribution between wrongdoers does not apply as between partners unless the partnership is an illegal partnership or unless the act relied on as the basis of the claim for contribution was not only illegal but the illegality such that it must or ought to have been known to the partner seeking contribution when the act was committed.
3. Thus, where a firm of attorneys, acting honestly and in good faith though under a mistaken conception of the law, devised and carried out a settlement agreement between the parties to a will contest, whereby the estate was distributed otherwise than as provided in the will and the attorneys received certain sums for their services, but on appeal from a judgment giving effect to such agreement it was held that it was invalid and repayment of the sums received by the attorneys was adjudged, one of said attorneys who, after dissolution of the firm, repaid the entire amount was entitled to contribution from his former partners.
4. Where one partner in a firm of attorneys was intrusted with the management of its financial affairs and all received their shares of the profits from him, their acceptance without question of the reports or statements submitted from time to time by him to them might constitute settlements; and where, after the firm had dissolved, one of its former members (not such manager) died, the testimony of a survivor that there had been a settlement of the partnership affairs did not necessarily relate to a personal transaction with such decedent.
5. Where a right to contribution from the estate of a decedent did not accrue until payment of a judgment, which was after the expiration of the time limited for presentation of claims against the estate, such claim might, under sec. 3860, Stats., be presented at any time within one year after it so accrued.

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APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is a claim for contribution brought by one partner against the estate of his deceased copartner. The essential facts were not disputed. Ryan, *Merton,* and Newbury were lawyers at Waukesha, and acted as attorneys for certain contestants in the matter of the will of the late John A. Rice, Mr. Ryan being actively in charge of the litigation. That gentleman devised and carried out an agreement by which the contest was settled, the will admitted to probate, and the estate distributed between all parties interested in a manner quite different from that provided by the will, and by which also the said firm was to receive $7,500 for their services in the whole litigation. This agreement was given effect by both the county and circuit courts of Waukesha county, and $5,000 was paid to the firm in August, 1907, and $2,500 in December, 1908, each payment being distributed to the three partners in shares according to their rights in the partnership business. The firm was dissolved April 1, 1910, and a new partner, Mr. Jacobson, was taken in. Mr. Ryan died July 13, 1911. The Rice estate litigation came by appeal to this court and was decided October 12, 1912 (*Will of Rice: Cowie v. Strohmeyer,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778), and it was held that the settlement agreement was invalid and that the sums received by the firm of Ryan, Merton & Newbury under the agreement must be paid back to the trustee of the estate. This decision was followed by a judgment of the circuit court for Waukesha county, December 16, 1912, in accordance with its terms, and subsequently *Mr. Merton,* the claimant, paid to the trustee the sum of $7,627.06, of which one half, *i. e.* $3,813.53, was Mr. Ryan's share. On December 23d following *Mr. Merton* presented his claim for the last named sum against the estate of Mr. Ryan, although the time limited for presentation of claims against that estate had expired January 25,

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1912. The claim was allowed in the county court and on appeal by the circuit court, and the executor appeals from such allowance.

For the appellant the cause was submitted on the briefs of *Daniel H. Grady.*

George D. Van Dyke and *M. A. Jacobson,* for the respondent.

WINSLOW, C. J. The appellant claims that the judgment should be reversed because (1) the judgment in the case of *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778, is *res adjudicata;* (2) the parties were wrongdoers between whom there can be no contribution; (3) there was no competent proof of the settlement of the partnership affairs of Ryan, Merton & Newbury; (4) the claim was barred because not filed within the time limited for general creditors to present claims against the estate.

1. The claim that the decision in the *Rice Will Case* is *res adjudicata* as to the rights of the firm as between themselves is plainly untenable. No issue of this kind was raised or tried in that case, and when it is claimed that the judgment in one case determines the rights of the parties in another case *upon a different cause of action* it must appear that the questions were actually litigated and decided in the former case. *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1; *Rahr v. Wittmann,* 147 Wis. 195, 132 N. W. 1107.

2. The principle that there can be no contribution between wrongdoers is very familiar and is frequently applied. As between partners, however, the rule is subject to this important modification, viz.: that a claim for contribution will not be rejected unless the partnership is an illegal partnership or unless the act relied on as the basis of the claim was not only illegal, but the illegality such that it must or ought to have been known to the partner seeking contribution to have been illegal when it was committed. 1 Lindley, Partn. (2d

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Am. ed.) 378; Story, Partn. (7th ed.) § 220; Shumaker, Partn. pp. 249, 250.

In the present case, although this court held the settlement contract invalid because the terms of a will could not thus be set aside, it did not hold that the firm of Ryan, Merton & Newbury were conscious wrongdoers. They were acting honestly and in good faith, but under a mistaken conception of the law, and hence the right of contribution exists.

3. The proof of settlement of the partnership affairs was scanty but sufficient. *Mr. Merton* was allowed (against objection for incompetency) to answer the direct question whether a settlement of the partnership affairs had been made It is said that he was not competent to answer the question because his answer involved a personal transaction with a deceased person. This does not necessarily follow. It appears by other testimony in the case that Mr. Newbury was the bookkeeper and cashier of the firm; that he paid the bills and distributed the moneys received between the partners apparently with frequency. Evidently the partners intrusted the financial matters of the firm to his management implicitly and received their shares from him as the business went along. There may easily have been settlements from time to time resulting simply from the acceptance by the partners without question of reports or statements submitted to them by Mr. Newbury. If it was desired to preserve the objection, counsel should have applied for leave to ask the witness whether the settlement was made personally with Mr. Ryan.

4. It is true that sec. 3844, Stats., provides that every claim against an estate not presented for allowance within the time fixed by the order limiting the time for the presentation of claims shall be barred, but sec. 3860 also provides that if a claim shall accrue or become absolute at any time after the expiration of the limited time it may be presented and proved at any time within one year after it accrues or

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becomes absolute. *Mr. Merton's* claim plainly comes within this class. He had no claim until he had paid the judgment in the *Rice Will Case,* and this was long after the expiration of the time limited.

By the Court.—Judgment affirmed.

HOUSER, Respondent, vs. WISCONSIN CHAIR COMPANY, Appellant.

May 22—June 17, 1914.

Master and servant: Injury to elevator operator: Contributory negligence: Unauthorized placing of another person in charge: Scope of employment: Disobedience of orders: Evidence: Safety of working place.

1. Plaintiff, an elevator man in defendant's employ, while cleaning the pit of the elevator was struck and injured by the descending car which he, without authority, had placed in the temporary charge of another person. Upon the evidence, findings by the jury to the effect that plaintiff supposed and had reason to suppose that he was authorized to place such other person in charge of the elevator, and that such person in operating it was within the scope of his employment, are *held* to be wholly unsupported.
2. It further appearing conclusively that plaintiff had been expressly instructed not to go into the pit without first tying the brake rope so that the car could not be moved and that he wilfully violated such instruction, a finding by the jury that he was free from contributory negligence was clearly contrary to the evidence.
3. Plaintiff's testimony that he did not know how to tie the rope and that "it wasn't up to me to ask," did not show a sufficient excuse for his violation of express orders, defendant's superintendent having the right, in view of plaintiff's experience and familiarity with elevators, to suppose that he understood his instructions or, if not, would at least make his ignorance known.
4. Plaintiff's working place and the appliances connected therewith, as he was ordered to use them, being safe, and he having wilfully and inexcusably violated his instructions without defendant's knowledge, the defendant is not liable for the consequent injuries.

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APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Action to recover for a personal injury.

Plaintiff while working for defendant in cleaning an elevator pit was struck by a descending car and injured.

The claim of the plaintiff was this: It was his duty to clean the pit. While he was so doing another servant, who was directed by him to operate the elevator in the meantime and not allow the car to go below the second floor, negligently failed to obey such direction, whereby the injury occurred. The claim of the defendant was that plaintiff was injured solely by his own carelessness.

There was evidence to this effect: Plaintiff was employed to run the elevator under a foreman named Boenning. He had been in defendant's employ at the factory for some years before the accident, though he had not been elevator man but a few weeks theretofore. At the bottom of the elevator shaft there was a pit about eighteen inches deep in which refuse was liable to accumulate so as to require it to be cleaned out twice a week. Prior to his time a boy ran the elevator and the pit was cleaned during noon hours or at other times when the appliance was out of service. When plaintiff was employed to take the boy's place he was directed to attend to cleaning the pit. He was instructed not to do it when the car was in service and not without tying the rope so the car could not be moved. His excuse for not obeying as to the rope was that he did not know how to tie it. There was a rope hanging in the shaft by which the elevator car was operated. When tied, so it could not be pulled to perform its purpose, the elevator was out of commission. Plaintiff did not ask his foreman for a man to run the elevator on the particular or any occasion. An employee by the name of Molitor, at plaintiff's request, was then operating the elevator. There was conflicting evidence as to whether a foreman by the name of Klietz, who had nothing to do with the mat-

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ter, suggested that plaintiff take Molitor for his assistant. Plaintiff claimed he directed Molitor not to operate the car below the second floor, but the latter, as he testified, was not made to so understand, or that plaintiff intended to go into the pit. He supposed plaintiff was going to sweep around the elevator and had no idea that he was in the pit when the car was caused to descend. There was always a man specially hired to run the elevator. No one had any business to interfere with it except under special permission or orders to do so.

The jury found that plaintiff was not authorized by the superintendent to place another in temporary charge of the elevator without consulting the particular foreman. Plaintiff supposed and, as a man of ordinary care had reason to suppose, that he might do as he did as to turning the operation of the elevator, temporarily, over to Molitor. Molitor was acting within the scope of his employment in operating the elevator. He failed to exercise ordinary care in respect to the matter which was the proximate cause of the accident. Plaintiff was free from any want of ordinary care proximately causing his injury. He was damaged to the extent of $3,000. Judgment was rendered in his favor for such sum with costs.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent there was a brief by *William F. Schanen,* attorney, and *James D. Shaw,* of counsel, and oral argument by *Mr. Shaw.*

MARSHALL, J. As indicated in the statement, respondent had no authority to place a man in temporary charge of the elevator without consulting Foreman Boenning; but the jury decided that he supposed, and had reasonable ground to suppose, he had authority to so place Molitor. If there is any

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basis whatever for that finding it is in the evidence to the effect that respondent had been accustomed to so place Molitor and had not been prohibited from doing so. Molitor, by the uncontroverted evidence, was under a foreman by the name of Klietz who had nothing to do with running the elevator or with directing respondent or any one else in respect to it. All power in that regard was vested in Foreman Boenning and respondent knew it. There is no need to recite the evidence in respect thereto. Suffice it to say that it is plain and conclusive.

Molitor was under Klietz, not Boenning. Klietz not only did not authorize Molitor, directly or indirectly, to run the elevator, but, on the contrary, expressly prohibited him from doing so. Molitor knew that he was acting outside the scope of his authority and in defiance of orders. His evidence and that of Klietz leave no doubt about it. Respondent testified that he asked Klietz for a man to operate the elevator temporarily, was directed to take one Lutz, and did not think that he had any authority to assign Molitor. We are unable to find any evidence, direct or circumstantial, contrary to this. So the findings as to respondent having efficient reason for supposing he had authority to engage Molitor to take temporary charge of the elevator and that Molitor, in complying, acted within the scope of his authority, are wholly unsupported.

There is evidence, direct and circumstantial, that respondent was authorized to leave the elevator in temporary charge of another, properly delegated by superior authority or engaged by him; but there does not seem to be any evidence indicating authority to have such assistant while he was engaged in cleaning out the elevator pit. He testified that he asked Klietz for such an assistant. He also testified that he spoke to the superintendent about having some one run the elevator on occasions, but did not testify that such occasions included when he might be in the pit. When asked so as to

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call for a particular statement he said, as before indicated, that he asked Klietz if he could have a man; that he was directed to take Lutz and did not think he was given power to take Molitor. As to his talk with the superintendent he said: "I asked for a man to run the elevator while I was cleaning the place." He "said I should get one. I should have a man to take charge of the elevator." "I should get some one to run it for me when I am not there."

If any such conversation as that indicated took place it must have related to running the elevator while respondent was cleaning up around it, which evidently was a frequent occurrence, while cleaning the pit was required only on Wednesdays and Saturdays, and to temporary absences which, according to the evidence, were liable to occur from various causes. There are conclusive reasons why it did not relate to the pit work and that respondent must have known it did not. In the first place, it was almost, if not quite, foolhardy conduct to go into the elevator pit to work while the elevator car was in service, even if the person in charge was admonished not to run to the lower floor. In the second place, the evidence is conclusive that respondent was expressly instructed not to go into the pit without first securing the car so it could not be moved. When the contract was made with him he was told "not to go under" the elevator "when it was running, when it was moving at any time, and if he did go under there that he should tie the rope." "To tie the rope and to be sure not to go under there without the rope being tied." That stands undisputed in the record. Moreover, it is corroborated by respondent. He testified: "The foreman told me that before I went under the elevator I should tie the rope." "The foreman did, but Moeser" (the superintendent) "had told me before. I asked him about it after that and he said that I should get some one to run it for me when I am not there. Moeser told me that when I was there about a week. The foreman told me a couple of days after. I just got through cleaning up. Moeser told

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me that. It was after Moeser told me. I did not ask the foreman how to tie the ropes, he did not show me and it wasn't up to me to ask him."

The idea of not going under the elevator without the rope being first tied so it could not be operated in the meantime, and that of having some one to run the elevator "when I am not there," if both are referable to the time of cleaning the pit, are such obvious contradictions that it must have been understood that the elevator car was to be out of service while the pit was being cleaned, and that, if respondent needed to be absent from work entirely, he might get some one in his place. It must be understood that the elevator was not open to be run by any one; that no one had any authority to operate it but respondent or some one specially designated therefor.

So respondent went into the place of danger contrary to express orders and did it consciously. His only excuse was that he did not know how to tie the rope and that it was none of his business to find out. If that were conceded, it does not do away with the fact that he was prohibited, and he knew he was prohibited, from going into the pit while the car was in service. If he did not know how to put the car out of service he should have informed himself and acted accordingly, or kept out of the pit.

Respondent's conception of duty to himself and to his employer, that it was not his business to make any inquiry in respect to doing what he was so carefully admonished to do for his own protection, in case of his needing instruction, is all wrong. He had been more or less familiar with the elevator for years. The evidence is to the effect that there was a brake rope which hung loose in the shaft by which the appliance was operated; that by pulling the rope it set the brake and stopped the car and that by so pulling and fastening the rope the car would be completely out of commission until the rope should be released. It is hard to believe that such a simple contrivance could have been unfamiliar to a person of

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respondent's age and experience who had been familiar with the elevator in a general way for years, and had been in charge of it for several weeks. The foreman and superintendent, evidently, supposed, and had a right to suppose, that he understood his instructions and how to execute them, certainly, if he did not he would make his want of knowledge known instead of wilfully violating his orders and depending upon his own way of substituting protection by selecting a man to keep the elevator in service while he cleaned the pit and instructed him not to run below the second floor. In a most inexcusable and negligent way respondent violated his instructions and took the chances. So we must hold that the findings as to his being excusable for placing Molitor in charge of the elevator while the pit was being cleaned and as to his being free from contributory negligence proximately contributing to his injury, are clearly contrary to the evidence. Appellant was not involved in the matter in any way whatever. Respondent's working place and the appliances connected therewith, as he was ordered to use them, were safe. He went contrary to his instruction, wholly upon his own responsibility and without the knowledge of respondent. He was not required or permitted to do as he did. The court below erred in not deciding accordingly.

We do not overlook the testimony of respondent as to thinking his foreman knew Molitor, on occasions, ran the elevator. His mere supposition cannot stand up against the positive testimony to the contrary and that it was his duty to run the elevator when there and that when he was not it either remained out of service or some one was put in his place.

By the Court.—The judgment appealed from is reversed, and the cause remanded with instructions to dismiss the same with costs.

SIEBECKER, KERWIN, and TIMLIN, JJ., dissent.

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TRANSFER REALTY COMPANY and others, Appellants, vs. CITY OF SUPERIOR and others, Respondents.

May 22—June 17, 1914.

Municipal corporations: Public improvements: Paving: Acceptance: Substantial performance: Compromise or adjustment with contractor: Special assessments: Validity.

1. Where the board of public works of a city at first refused to accept a street pavement because not in compliance with the contract, but afterward, upon investigation and report by the city engineer, accepted it with a deduction of $2,400 to make good the difference in value between the pavement as laid and as contracted for, to which deduction the contractor agreed, this was a sufficient acceptance of the work upon which to base a special assessment against the abutting property.
2. The power vested in the board of public works to pass upon the question of performance of a contract for street paving necessarily gives to it authority to decide whether there has been substantial performance; and where there has been substantial performance acceptance of the work does not change the contract.
3. Adjustments with a contractor for public work upon the basis of substantial performance, allowances being made for departures from literal compliance, are not compromises in the ordinary sense of the term, but are equitable and just and are binding where full benefits have been received under them.
4. The validity of an acceptance of street paving by the board of public works is not affected by the fact that it was first recommended by the common council.
5. *Chippewa B. Co. v. Durand*, 122 Wis. 85, and other cases relating to contracts made in violation of law, distinguished.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Fourteen parties, owners of real estate in the city of *Superior,* brought separate actions to set aside special assessment certificates and bonds issued by the city of *Superior* for the improvement of Belknap street in said city. The actions were dismissed as to three plaintiffs and consolidated as to the

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balance. There was a judgment for defendants and the following plaintiffs appealed: *Transfer Realty Company, Lake Superior Hotel Company, William Simes* and *John P. Lyman, Massachusetts Realty Company, Thomas Thompson, C. L. Wohlwend, Henry P. Booth, Belknap Street Company, Otto H. Hehne, Interstate Hotel Company,* and *Roy D. Lattin.* The defendants are the city of *Superior, R. E. McKeague,* city clerk of the city of *Superior,* P. McDonnell, *Bank of Commerce,* and *Grace, Hudnall,* and *Fridley.* The defendants are the same in all cases except that defendants *Grace, Hudnall,* and *Fridley* are interested only in the case in which the *Transfer Realty Company* was plaintiff before consolidation. The complaints are the same in all cases except as to description of property and the fact that certificates were issued on some property and special bonds on other property.

The principal question involved on the trial was whether the work was done according to the contract. The court found among other things that a contract was entered into with the defendant McDonnell for the improvement of the street according to plans and specifications and that the work was completed by him according to contract; that the work was done under the supervision of the board of public works and the city engineer; that when the work was started some "bank" sand was used for filling under the concrete foundation, and upon complaint being made by plaintiffs the use of "bank" sand was discontinued and thereafter bay sand was used throughout the work for such filling; that during the execution of the work complaints were made as to cracks in the concrete base and soft places in the concrete; also complaint was made that the contractor was using in the concrete less cement than was called for by the specifications; that the city engineer insisted and still insists in good faith that the concrete used fully met the requirements of the specifications; that the complaints made were without foundation or the matters complained of were without importance as affecting

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the quality of the work involved; that except in the following particulars the work done complied with the specifications:

"1st. That sand used for filling under the concrete, except a small amount of 'bank' sand, was 'bay' sand, while the specifications call for 'clean' sand.

"2d. The filling sand was not all wet down before the concrete was laid thereon.

"3d. The asphalt used was not fluxed in *Superior*.

"4th. The asphalt used contained about fifty-five per cent. of bitumen.

"5th. The asphalt, when laid during cold weather, was in some places melted by the use of hot irons.

"6th. The wearing surface is of less thickness than specified."

As to the effect of the foregoing the court found:

"That the filling sand is intended to serve two purposes: (a) an easily molded, even surface, and (b) drainage. 'Bay' sand is considerably less expensive than 'clean' sand, but the evidence does not disclose that 'bay' sand or 'bank' sand do not serve the purposes mentioned as well as 'clean' sand would.

"That in view of the fact that the concrete was mixed and put upon the sand so wet as to be liquid, water in the concrete saturated the same as completely as though wet by a separate process and so far as the court can see met all practical requirements.

"That the city waived, as it had power to do, the requirements that the asphalt should be fluxed in *Superior*.

"The asphalt used was Trinidad asphalt, and although it did not analyze as high in bitumen as required by the specifications it was required to be used by the board of public works, and the contractor in using it only did so because so required, and that the same was as good as is used for paving purposes. It does not appear from the evidence as to whether or not asphalt of the test specified was commercially obtainable.

"No complaint is made that the work was not pressed with diligence. It was started immediately upon the signing of the contract. Before the work was completed the weather

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became cold and asphalt does not work well in cold weather, because it cools before it can be put in place. Hot irons were used to melt the asphalt and some spots were burned and left 'spongy.' That such spots as there are will to any extent affect the life or usefulness of the pavement, or if so to what extent, does not appear from the evidence. Moreover, this defect with all others are covered by the five-year bond furnished by the contractor when the contract was entered into. No other possible method for doing the work was suggested in the evidence, so that it was a question as to what course the city should pursue—whether to permit the work to be done or to stop the work and perhaps finish it the next season.

"The court therefore finds that the use of the hot irons in laying the asphalt does not in any practical sense affect the life, usefulness, or value of the pavement.

"There is little, if any, dispute as to the condition of the asphalt coating on the street as to its thickness, the nature of the surface, or the causes therefor. The binder was in some places a trifle thicker than specified, and the wearing surface was, owing to the weight of the roller used, somewhat thinner in places than specified, not because of an insufficient quantity of asphalt having been used, but because the excessive weight of the roller used forced the soft asphalt down into and amalgamated it to some extent with the binder coat.

"The heavy roller was used apparently without objection from the city, probably because no other was available. The evidence in the case does not tend to prove that the life, usefulness, or value of the pavement is affected by the condition mentioned, except to the extent that the asphalt covering is thinner than that specified, and the court finds that the life, usefulness, and value of the pavement is by reason of the failure mentioned affected only to that extent."

The court further found that the pavement was completed prior to December 2, 1911, and was a substantial and practical compliance with the contract except as to the thickness of the asphalt covering thereon; that the damage to the improvement and the owners of property assessed for the payment of the costs thereof resulting from all matters and things mentioned in the complaint or proved upon the trial was fully

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covered by the $2,400 deducted from the contract price in the compromise made with the defendant McDonnell.

Among other things the court concluded as matter of law, that, as modified by the compromise mentioned in the findings of fact, the contract in question was substantially performed; that the action taken by the board of public works and the issuance by it of the certificates and bonds in question constituted an acceptance and approval of the work; that at the time the certificates and bonds in question were issued there had been "full performance" of the work and said certificates and bonds were legally issued and valid; that the compromise made with the contractor was and is valid; that the proofs fail to show that plaintiffs suffered any damage by reason of the matters complained of, and, except as to the plaintiff Orson Clarke Gillette, they are entitled to no relief.

Judgment was entered in accordance with the findings dismissing the plaintiffs' complaint except as to Gillette, from which judgment this appeal was taken.

For the appellants there was a brief by *Hanitch & Hartley,* and oral argument by *Louis Hanitch* and *C. J. Hartley.* They cited, among other authorities, *Schumm v. Seymour,* 24 N. J. Eq. 143; 1 Page & Jones, Taxation by Assessment, § 530; *Wilcox v. Porth,* 154 Wis. 422, 143 N. W. 165; *Superior v. Roemer,* 154 Wis. 345, 141 N. W. 250; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *McMillan v. Barber A. P. Co.* 151 Wis. 48, 138 N. W. 94; *Van Valkenburgh v. Milwaukee,* 157 Wis. 55, 143 N. W. 1052, 147 N. W. 67, *McCain v. Des Moines,* 128 Iowa, 331, 103 N. W. 979; *Fond du Lac v. Barber A. P. Co.* 156 Wis. 471, 146 N. W. 509; *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240.

E. F. McCausland, for the respondent *Bank of Commerce.*

For the respondents *City of Superior* and its officers there was a brief by *H. V. Gard* and *T. L. McIntosh,* and oral argument by *Mr. McIntosh.* They cited 1 Smith, Mun. Corp.

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§§ 731–735; 4 McQuillin, Mun. Corp. §§ 1925–1954; 5 id. § 2479; 2 Dillon, Mun. Corp. (5th ed.) pp. 1255–1257; 4 id. p. 2628; *Lafebre v. Board of Ed.* 81 Wis. 660, 51 N. W. 952; *Washburn Co. v. Thompson,* 99 Wis. 585, 594, 75 N. W. 309; *Eirmann v. Milwaukee,* 142 Wis. 606, 126 N. W. 53; *Cook v. Racine,* 49 Wis. 243, 5 N. W. 352; *Wells v. Western P. & S. Co.* 96 Wis. 166, 70 N. W. 1071; *Hoile v. Bailey,* 58 Wis. 434, 17 N. W. 322; *Colby v. Franklin,* 15 Wis. 311; *Brodhead v. Milwaukee,* 19 Wis. 624; *Curran v. Holliston,* 130 Mass. 272; *Friend v. Gilbert,* 108 Mass. 480; *Stockdale v. School Dist.* 47 Mich. 226, 10 N. W. 349; 1 Page & Jones, Taxation by Assessment, §§ 527, 529, 531, 533; *Fass v. Seehawer,* 60 Wis. 525, 537, 19 N. W. 533; and other cases.

For the respondents *Grace, Hudnall & Fridley* there was a brief by *C. R. Fridley,* and oral argument by *George B. Hudnall.*

KERWIN, J. The contract for doing the paving in question was duly let to the defendant McDonnell according to plans and specifications and he entered upon the execution of the work, which was done under supervision of the board of public works and the engineer of the defendant city. During the progress of the work a dispute arose between the plaintiffs and the contractor, McDonnell, as to the meaning of the specifications and proper performance of the work under the contract. The plaintiffs employed an engineer to watch the work as it progressed, and complaints were made from time to time by the plaintiffs as to the character of the work performed and material used in the construction of the improvement.

The vital question upon this appeal and the one upon which the case turns is whether the paving was done according to contract or substantially so. The court below found that the complaints made regarding the execution of the con-

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tract were without foundation, and that the work had been done in accordance with the contract and specifications except in the particulars set out in the statement of facts.

Counsel for appellants attack the findings as not supported by the evidence and also insist that the findings do not support the judgment. We shall not extend this opinion by a discussion of the evidence. It is sufficient to say that after a careful examination of it we are convinced that the findings are well supported.

No complaint is made that the contract was not properly let according to law to the lowest bidder. The court below in its findings points out the different particulars in which the contractor failed to literally comply with the specifications, and gives its conclusions that the specifications and contract under which the work was done were substantially complied with and that the amount deducted from the contract price, namely, $2,400, fully covered any defective performance or failure to comply literally with the contract.

Stress is placed by counsel for appellants upon the fact that the board of public works first refused to approve the work because not in compliance with the contract, but afterwards did so upon investigation and recommendation from the common council of defendant city. On this point the court below found: That after refusal to accept, the board of public works caused the city engineer to investigate and examine the pavement and to compute and determine what deductions from the contract price should be made by reason of noncompliance with the contract and specifications, and the city engineer pursuant thereto computed and reported that a deduction of $2,400 would fully cover the difference between the value of the pavement as laid and its value had it been in strict compliance with the contract in all respects; that on January 2, 1912, the board of public works referred the matter to the common council for instructions; that a committee of the common council was appointed, which committee

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on January 16, 1912, reported recommending acceptance of the work, deducting $2,400 from the contract price; that on January 16, 1912, the common council of defendant city adopted a resolution authorizing the board of public works to accept the work under the contract upon the contractor filing with the city clerk an acceptance of the proposed settlement; that on January 17, 1912, the contractor filed an acceptance of the proposed settlement; that on January 17, 1912, said board of public works accepted the improvement for the sum of $54,248.26; that thereafter certificates and bonds were by said board of public works duly issued for special assessments against the property of plaintiffs, the amounts so assessed having been reduced proportionately by the reduction from the contract price, and said bonds were on January 19, 1912, delivered to the defendant contractor.

The foregoing findings are attacked by counsel for appellants on the ground that they do not show an acceptance by the board of public works. We think the action of the board clearly shows an acceptance and approval, and we know of no reason why it could not accept after proper adjustment of the claim had been made showing substantial compliance with the contract, even if it had no power before.

The board of public works under the charter was charged with the duty of passing upon the work and approving or disapproving it. It is clear from the record before us that the board and all officers of defendant city acted in good faith in the matter and made diligent effort to ascertain what it was in duty bound to do regarding the contract in question. And it is plain that in its efforts to do its duty between all parties it first decided not to accept, and afterwards, upon more thorough investigation and agreement for reduction of the claim, decided to and did accept the reduced claim as before stated.

It is argued by counsel for appellants that the board of public works had no power to change the contract. As a general proposition this may be conceded, but the board has power to pass upon the question of performance of the contract and

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whether it had been in fact performed. This power vests in the board, necessarily, the authority to decide whether there has been substantial performance, because substantial performance is performance. 4 Dillon, Mun. Corp. (5th ed.) p. 2628; 1 Page & Jones, Taxation by Assessment, §§ 527, 531. Substantial performance of a contract such as the one under consideration is substantial justice, where no damage is suffered by failure to literally perform. *Lawton v. Racine,* 137 Wis. 593, 119 N. W. 331; *Beaser v. Barber A. P. Co.* 120 Wis. 599, 98 N. W. 525; *Lafebre v. Board of Ed.* 81 Wis. 660, 51 N. W. 952; *Wells v. Western P. & S. Co.* 96 Wis. 116, 70 N. W. 1071; *Cook v. Racine,* 49 Wis. 243, 5 N. W. 352; *Colby v. Franklin,* 15 Wis. 311; 1 Page & Jones, Taxation by Assessment, § 529; *In re Apple* (Iowa) 142 N. W. 1021.

Considerable is said by counsel for appellants on the point that the board had no power to compromise. We need not pass upon the question whether compromise, except as a basis for substantial performance, is within the power of the board, because the adjustment was not a compromise of a disputed claim in the ordinary sense of that term. It was more in the nature of acceptance of the work on the terms of substantial performance. Such adjustments are equitable and just, and are held binding by the courts where full benefits have been received under them. 2 Dillon, Mun. Corp. (5th ed.) pp. 1255–1257.

Some claim is made by appellants that it appears that the board of public works accepted the work because ordered to do so by resolution of the common council and that the common council had no power to so order. The board of public works, when it accepted, did so as a board by virtue of the power vested in it under the law, and whether the common council by resolution or otherwise recommended such action is wholly immaterial. The board approves the improvement by force of the statute.

Appellants rely upon *Chippewa B. Co. v. Durand,* 122

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Wis. 85, 99 N. W. 603; *Wells v. Burnham,* 20 Wis. 112; and *Cawker v. Central B. P. Co.* 140 Wis. 25, 121 N. W. 888. In these cases it will be seen that no jurisdiction was ever obtained of the subject matter, because the contracts were in direct violation of law. In *Wells v. Burnham, supra,* in referring to the fact that the contract was let in violation of the provision of the city charter, the court said: "A violation of that provision must always, *prima facie* at least, affect the substantial justice of any tax in a case similar to this." In *Chippewa B. Co. v. Durand, supra,* the basis of the decision is that the contract was not let in the manner prescribed by the city charter, hence no obligation was imposed upon the city to pay for the work. Likewise in *Cawker v. Central B. P. Co., supra,* the contract was held void because of failure to comply with charter provisions.

In the view we take of the case other questions discussed do not require treatment. We are satisfied that the judgment below is right and should be affirmed.

By the Court.—The judgment is affirmed.

PARMENTIER, Administrator, Appellant, vs. MCGINNIS and others, Respondents.

May 23—June 17, 1914.

Prize fighting: Boxing exhibition: Action for death: Questions for jury: Setting aside verdict: Passion or prejudice.

1. In an action for death of plaintiff's intestate, which occurred while he was taking part in a boxing contest, findings by the jury to the effect that such contest was not a fight of the character forbidden by sec. 4520, Stats., nor a fight by mutual consent which would make each participant liable to the other for actual damages, are *held* to be supported by the evidence.

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2. The trial court was justified in this case in refusing to set aside, on the ground that the jury were actuated by passion or prejudice, a special verdict which included a finding that the death of the plaintiff's intestate was not the proximate result of his taking part in the boxing contest, and the answer "Not any" to the question as to what amount of money would compensate his parents for their pecuniary loss occasioned by his death.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff as administrator to recover damages for the alleged death of his son, a boy about seventeen years and eight months old. The death occurred while the boy was engaged in a boxing exhibition in the city of Green Bay, Wisconsin, on December 26, 1910, the defendants being the other participant in the exhibition, *Lom;* the promoter, *McGinnis;* the referee who officiated, *Tonne;* and two spectators, *Allen* and *Abrams,* the latter of whom was at the time mayor of the city of Green Bay. Two other spectators were made defendants in the court below, but there is no appeal as to them.

The evidence shows that during the interval between the fifth and sixth rounds of the exhibition, while resting in his corner, the plaintiff's intestate collapsed into a state of unconsciousness and died.

The following special verdict was rendered:

"(1) Was the death of John Parmentier the proximate result of his taking part in the contest with the defendant *Lom?* *A.* No.

"(2) If your answer to the first question should be 'Yes,' then answer this: Was said contest a fight in which each sought to gain an advantage over the other by injuring him by means of blows? *A.* No.

"(3) If your answer to the second question should be 'Yes,' then answer this: Did the parties who arranged for said contest understand and intend when doing so that it was to be such a fight? *A.* No.

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"(4) If your answer to the first, second, and third questions shall be 'Yes,' then answer these:

"Did the defendant *Allen,* when he went to witness said contest, know or expect that it was to be such a fight? *A.* No.

"Did the defendant *Abrams,* when he went to witness said contest, know or expect that it was to be such a fight? *A.* No.

"Did the defendant Murphy, when he went to witness said contest, know or expect that it was to be such a fight? *A.* No.

"Did the defendant McGeehan, when he went to witness said contest, know or expect that it was to be such a fight? *A.* No.

"Did the defendant *Tonne,* when he acted as referee at said contest, know or understand that it was to be such a fight? *A.* No.

"(5) If your answer to the second question should be 'Yes' and your answer to the fourth question as to the defendant *Allen* should be 'No,' then answer this: Did the defendant *Allen* discover that it was such a fight during its progress, and thereafter and prior to Parmentier's collapse aid, abet, or encourage it? *A.* No.

"(6) If your answer to the second question should be 'Yes' and your answer to the fourth question as to the defendant *Abrams* should be 'No,' then answer this: Did the defendant *Abrams* discover that it was such a fight during its progress, and thereafter and prior to Parmentier's collapse aid, abet, or encourage it? *A.* No.

"(7) If your answer to the second question should be 'Yes' and your answer to the fourth question as to the defendant Murphy should be 'No,' then answer this: Did the defendant Murphy discover that it was such a fight during its progress, and thereafter and prior to Parmentier's collapse aid, abet, or encourage it? *A.* No.

"(8) If your answer to the second question should be 'Yes' and your answer to the fourth question as to the defendant McGeehan should be 'No,' then answer this: Did the defendant McGeehan discover that it was such a fight during its progress, and thereafter and prior to Parmentier's collapse aid, abet or encourage it? *A.* No.

"(9) If your answer to the second question should be 'Yes' and your answer to the fourth question as to the defendant *Tonne* should be 'No,' then answer this: Did the defendant

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Tonne discover that it was such a fight during its progress, and thereafter and prior to Parmentier's collapse aid, abet, or encourage it? *A.* No.

"(10) At what amount do you assess the damages sustained by John Parmentier up to the time of his death, as the proximate result of his taking part in said contest? *A.* Not any.

"(11) What amount of money will compensate the parents of John Parmentier for their pecuniary loss occasioned by the death of their son? *A.* Not any."

The plaintiff's motion to set aside the answers in the special verdict and for a new trial was denied and judgment entered on the verdict dismissing the complaint with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *F. C. Cady.*

For the respondents there was a brief signed by *Kittell & Burke,* attorneys for *McGinnis, Allen,* and *Lom,* by *T. P. Silverwood,* attorney for *Abrams,* and by *James H. McGillan,* attorney for *Tonne;* and the cause was argued orally by *Mr. J. A. Kittell* and *Mr. Silverwood.*

KERWIN, J. The contention of appellant is that the exhibition in question was a fight within the provisions of sec. 4520, Stats., which provides in effect that any person who shall by previous arrangement or appointment engage in a fight with another person for the possession of any prize, belt, or other evidence of championship, or for any other cause, shall be punished, etc.; and if not a fight within the meaning of this statute, it was a fight by mutual consent, which would make each participant liable to the other for actual damages received in the absence of the statute. But this question was squarely submitted to the jury and answered in the negative, the jury holding that the exhibition was not a fight. The main question, therefore, on this appeal is whether the answer of the jury to the second question

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is supported by the evidence. We are satisfied from a careful examination of the record that there is an abundance of evidence to support this finding. Exception is taken by appellant to some portions of the charge on this question, but we find no error in that regard.

Error is also assigned by counsel for appellant on refusal to give instructions asked, the formation of the verdict, and in admission and exclusion of evidence. We find no error under these heads.

The exhibition in controversy seems clearly to come within the finding of the jury as a mere boxing exhibition or match and not a prize fight, and this was a question of fact for the jury. *State v. Olympic Club,* 46 La. Ann. 935, 15 South. 190, 24 L. R. A. 452; *State v. Purtell,* 56 Kan. 479, 43 Pac. 782; *Seville v. State,* 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; *People v. Taylor,* 96 Mich. 576, 56 N. W. 27.

Counsel for appellant, however, vigorously attack the verdict of the jury on the ground that the findings returned show that the jury were actuated by passion or prejudice. This contention is based, chiefly, upon the findings to the first and eleventh questions of the special verdict. Whether the death of the plaintiff's son was caused by exhaustion occasioned by the contest is not very material, since the finding of the jury to the second question, namely, that the exhibition was not a fight, is supported by the evidence. The same is true as regards the answer to the eleventh question, because the answer to the second question relieves the defendants from liability, and it is quite obvious that the jury were influenced by the conclusion reached on the second question and the evidence regarding other questions of the special verdict, therefore were not actuated by passion or prejudice. We think, taking the verdict as a whole, it cannot be said that the court below was wrong in finding that the jury were not actuated by passion or prejudice, therefore the appellant's contention under that head cannot be sustained. The trial court, who

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was in better position than this court to judge respecting the question of passion, prejudice, and fairness of the jury, overruled appellant's contention in that regard, and was of the opinion that the verdict of the jury was the result of honest judgment, and the court below was therefore justified in refusing to set it aside. *Lines v. Milwaukee,* 147 Wis. 546, 133 N. W. 592. The record shows that the case was carefully and fairly tried below and no prejudicial error committed. The judgment must therefore be affirmed.

By the Court.—The judgment is affirmed.

BARNES, J. I dissent. It seems to me that the deceased was killed in a fight and that no other conclusion is warranted by the credible evidence.

LUEBKE, Respondent, vs. SALZWEDEL, Appellant.

May 23—June 17, 1914.

Equity: Clean hands: Conduct in different transaction not a bar to relief: Deeds: Delivery: Cloud upon title: New trial: Newly discovered evidence.

1. **Inequitable conduct of the plaintiff in other or different transactions is not a bar to equitable relief in the transaction involved in an action, if he is otherwise entitled to that relief.**
2. **Thus, even if the plaintiff attempted or intended to defraud his wife (who was about to sue for a divorce) by a conveyance of his land which he neither delivered nor recorded, he is not debarred from equitable relief against the grantee named in such undelivered deed who fraudulently or without his consent obtained possession thereof and had it recorded.**
3. **A motion for a new trial on the ground of newly discovered evidence was properly denied where such evidence was merely cumulative.**

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *P. J. Winter* and *E. V. Werner,* and for the respondent on that of *Llewellyn Cole.*

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TIMLIN, J. This suit was brought by the plaintiff against his daughter, the defendant, to cancel a recorded deed of certain land belonging to plaintiff, which deed was executed at plaintiff's request by plaintiff's brother, from whom a deed was due to plaintiff, to the defendant as grantee, but never delivered, and also for the purpose of quieting plaintiff's title. It is a family quarrel, and there are charges and countercharges of fraud freely made involving plaintiff, defendant, and other members of the Luebke family.

The learned circuit judge found that the plaintiff was, during this period of strife and long before, in possession of the land in question, and that he got title by deed from his first wife, who thereafter died. Plaintiff married again and with his second wife conveyed the land to plaintiff's brother. His second wife secured a divorce, and plaintiff, contemplating making a contract for his support and maintenance with his daughter *Emma,* who is defendant, procured a warranty deed from his brother running to this daughter, but left it in the custody of another daughter for safe-keeping with instructions not to deliver it. The last mentioned daughter fraudulently and without the knowledge or consent of plaintiff delivered the deed to *Emma,* who, without plaintiff's knowledge or consent, had it recorded and then refused to enter into any agreement with plaintiff for his support and maintenance. Plaintiff's brother then executed another deed of the land directly to plaintiff. There is evidence to support these findings, and the conclusion based thereon that the plaintiff is owner and that the deed to *Emma* is void for want of delivery and a cloud on plaintiff's title and should be annulled follows legitimately. We cannot say these findings are against the clear preponderance of the evidence. It is argued that the plaintiff caused the deed which he and his second wife executed to plaintiff's brother and the deed from the latter to *Emma* to be executed for the purpose of defrauding this wife in the divorce suit soon to be instituted

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and therefore he should not be heard in equity. But this is a misapplication of the equity rule or rules which deny equity to the worker of iniquity, refuse to aid those in equal delict, and require suitors to reach for their rights with clean hands. Neither of these rules considers inequitable conduct in other or different transactions a bar to relief in the particular transaction under investigation if the plaintiff is otherwise entitled to that relief. Concretely, if *Carl Luebke* cheated or attempted to cheat his second wife out of this land by a conveyance thereof which he neither delivered nor recorded, that is no reason why his daughter should be permitted to cheat him out of the land by fraudulently or without his consent obtaining possession of the undelivered deed. It is found as a fact resting upon evidence that there was no delivery of the deed by the plaintiff or by any one for him to *Emma*. A request for a new trial in the circuit court was made, based upon the claim that the plaintiff made some oral admissions to third persons to the effect that he had delivered the deed to *Emma*. Such evidence was merely cumulative to that given upon the trial by *Emma* and others and the new trial was therefore properly denied. Counsel have made a very earnest and industrious effort to convince us of error in the proceedings of the trial court, but we are unable to say that the findings are against the clear preponderance of the evidence or that any error of law intervened, so the judgment must be affirmed.

By the Court.—Judgment affirmed.

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PULP WOOD COMPANY, Appellant, vs. GREEN BAY PAPER & FIBER COMPANY, Respondent.

May 23—June 17, 1914.

Interstate commerce: Contracts: Construction: Validity: Restraint of trade: Statutes construed: Federal and state statutes: Combinations, when unlawful: Sales: Remedies of vendor: Pleading: Demurrer.

1. A contract to furnish a manufacturer in this state with pulp wood coming from Wisconsin, Minnesota, Michigan, and the Dominion of Canada involves interstate commerce, and the question whether it is illegal because of being in restraint of trade is to be determined by the federal rather than the state statute.
2. A contract which contravenes public law is void and no recovery can be had thereon.
3. Where the sufficiency of a complaint is challenged by demurrer every reasonable intendment must be made in favor of the pleading.
4. Where a contract is fairly open to two constructions, by one of which it would be lawful and by the other unlawful, the former must be adopted.
5. The words "restraint of trade" as used in the federal anti-trust statute have the same meaning as at common law and in the law of this country at the time of its passage, and embrace only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade.
6. Whether or not a particular contract contravenes the law depends on the extent to which competition has been restricted or trade has been obstructed, and this must be determined from the existing facts; when the facts are ascertained the question whether the restraint is reasonable or otherwise becomes one of law.
7. There is nothing in itself unlawful in two or more persons appointing a common agent to purchase a commodity which they require and in giving such agent the exclusive right to do the buying.
8. Such an arrangement becomes unlawful when it injuriously affects the public, that is, when it unduly restricts competition

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or restrains trade, and this must ordinarily be made to appear from facts outside of the contract.

9. The producer of a commodity is entitled to protection against combinations which unreasonably depress the price of such commodity, even though the general public might to some extent benefit by the depression.

10. A contract which contemplated the supplying of pulp wood by plaintiff to twelve large paper manufacturers who used about twelve per cent. of the entire supply of pulp wood in the particular territory,—the season's requirements of each being estimated,—and which bound the defendant to buy pulp wood of no other person, is not, upon its face, unduly restrictive of trade, and hence not to be pronounced illegal upon demurrer to the complaint in an action brought thereon.

11. Where a complaint attempts to state several causes of action and defendant demurs generally to the whole complaint, if any good cause of action is stated the demurrer must be overruled.

12. The mere fact that a vendor corporation is an unlawful combination will not relieve the vendee from paying for goods purchased from it, provided the contract of purchase is not in itself unlawful.

13. Sec. 1747*e*, Stats., is substantially a copy of the federal anti-trust statute, restricted in operation to this state and with a lesser penalty, and it should receive the same interpretation that has been placed upon the federal act by the supreme court of the United States.

APPEAL from an order of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This action arises out of a series of contracts made between the plaintiff and the defendant, whereby plaintiff agreed to supply the defendant with pulp wood for consumption at its paper mill. These contracts were made from year to year and covered the years 1904 to 1909 inclusive. A formal contract was not made covering the year 1909, but it is alleged that a contract was made by letter for that year similar to those covering previous years. The formal contracts are alike in terms except as to the amount of wood to be furnished and the so-called base price to be paid therefor. These contracts are attached to the complaint as exhibits and made a

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part thereof. Exhibit "B," covering the year 1905, is printed and is as follows:

"Whereas, the *Pulp Wood Company* of Appleton, first party, has requirements during the year 1905 of 91,800 cords of pulp wood and has contracted to deliver to the Riverside Fiber and Paper Company 19,000 cords and the Thilmany Pulp and Paper Company 1,000 cords, and the Lindauer Pulp Company 1,650 cords, and the Outagamie Paper Company 3,500 cords during the same season, making a total of 116,950 cords, and

"Whereas, the *Green Bay Paper and Fiber Company* of Green Bay, the second party, has need during the season of 1905, for its own use, of 5,000 cords of spruce pulp wood, and 17,500 cords of hemlock pulp wood, and 2,000 cords of balsam pulp wood,

"Now, therefore, it is mutually agreed,

"First. That the first party will use due diligence to furnish to the second party said 5,000 cords of spruce pulp wood, and 17,500 cords of hemlock pulp wood, and 2,000 cords of balsam pulp wood, during said year, that being amount of the estimated requirements of the second party, all pulp wood to be of the quality and dimensions equal to that provided by the first party for its own use and for said third parties above mentioned.

"Second. That the second party shall receive and pay for its *pro rata* share of the entire amount of pulp wood, which the first party shall of necessity deliver in order to operate economically, during the season of 1905, if in excess of the 141,450 cords above specified, based on the amounts above specified for delivery. And that it will accept its *pro rata* share of the pulp wood which the said first party is able to deliver during the season, if same is less than 141,450 cords, to the end that said second party shall acquit the first party of all liability for diminution in amount if the first party is not able to furnish the entire 141,450 cords. And that the first party shall be relieved of excess or surplus.

"Third. Said first party will receive and said second party will pay for said pulp wood its *pro rata* share of cost, including all expense of operating by said first party and seven per cent. interest on the capital employed in cutting, getting out

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and delivering the 141,450 cords more or less of wood above specified.

"Fourth. Said first party shall deliver said pulp wood in the storage booms of the party of the second part at Green Bay, Wisconsin, either from raft or by scow at option of second party, and if, at any time, said storage booms are full, then said first party may deliver the above mentioned wood alongside said storage booms at the risk and expense of the second party. But it shall be optional with the first party as to whether all deliveries shall be made by water or part by rail, excepting that enough wood must be delivered from time to time by rail if necessary to keep second party's mill running, subject to clause fifth.

"Fifth. Delivery shall be made of said pulp wood from time to time to said second party *pro rata* with deliveries for the requirements of the first party and the requirements of the third parties mentioned.

"Sixth. On the second Monday following a Saturday's completed delivery, said second party shall and will pay to said first party on all wood not theretofore paid for as follows:

"On spruce pulp wood $9 per cord.

"On hemlock pulp wood $5.50 per cord.

"On balsam pulp wood $5.75 per cord.

"But if said second party shall choose to anticipate payment, it shall be entitled to credit at the rate of seven per cent. per annum, and if it shall not pay promptly on day for payment, it shall and will pay seven per cent. per annum for the time bill remains overdue.

"Seventh. Second party will not purchase any pulp wood from any person, firm or corporation other than as agreed above for use during the year 1905.

"Eighth. The scale of the first party taken at the points where the pulp wood is put in the water shall be final and conclusive upon both parties, as to all pulp wood delivered by water, excepting that the second party shall be entitled to the same percentage of reduction on the scale of the wood that is delivered to it as the diminution on the whole amount handled by water shall prove to be.

"Ninth. Each kind of wood shall be delivered separately, that is, one kind shall not be mixed with another.

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"Tenth. A settlement shall be had at the end of the season, and thereupon, the first party shall return to the second party, or the second party shall further pay to the first party such balance as there may be for or against the second party, on account that the price fixed in paragraph sixth for the pulp wood shall prove to be greater or less than the price as fixed by clause third.

"In witness whereof, the said parties have caused these presents to be signed in duplicate by their respective presidents and treasurers or secretaries this 22d day of December, 1904."

The amended complaint alleges that the plaintiff is a corporation organized for the purchase and sale of pulp wood and that the defendant is a corporation engaged in the manufacture of paper. The making of the various contracts before referred to is then set forth. The complaint then alleges that on September 25, 1903, the plaintiff entered into a contract with one Perry to enable the plaintiff to furnish spruce pulp wood to its customers and that a copy of such contract is annexed to the complaint. Certain modifications of the Perry contract are then set forth and said modifications are also made a part of the complaint. The complaint then alleges that the defendant, before making the contract for the year 1904, knew of the contract with said Perry and knew of the modifications of said contract about the time the same were made, and that spruce pulp wood was delivered under said contracts for the years 1904 to 1907 inclusive, to the amount stated in a schedule annexed to the complaint marked Exhibit 1. It is then alleged that on account of 4,201 cords of spruce pulp wood delivered to the defendant for the year 1904 the sum of $37,058.05 was paid by the defendant, that being the sum which appeared to be due at the time the calculation for the cost of the wood for that year was made and supposed by the parties to be the contract price for the wood furnished, and that other like purchasers made payments on the same basis; that on account of the 5,549 cords of spruce pulp wood delivered to the defendant under the 1905 con-

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tract, $47,688.59 was paid by the defendant as the calculated cost of the wood furnished for that year, being the amount supposed by the parties to the contract to be the price therefor, and that other purchasers made a like payment; that payment was made on a like basis for 4,116 cords of pulp wood delivered for the year 1906; that in the year 1907 it became apparent that plaintiff would sustain a loss on the Perry contract and that such loss could not at that time be ascertained; that the 5,601 cords of spruce pulp wood delivered to the defendant under the contract for the year 1907 were partly settled for, such settlement being made on the same basis as for the three previous years, except that the parties left the loss on the Perry contract to be adjusted when the amount of the loss should be ascertained, and that the other purchasers made payments on the same basis; that in 1907 Perry refused to further perform or fulfil his contract and was then insolvent, and on April 13, 1910, was adjudged bankrupt on his own petition by the district court of the United States for the Western district of Michigan; that plaintiff lost through such failure the sum of $81,468.21, on account of advances made to him pursuant to such contract, which loss was not ascertainable until after September, 1910; that said plaintiff advanced to said Perry under said contract in the year 1907 a sum in excess of $110,000; that the failure of Perry and the consequent loss made the spruce pulp wood delivered by said Perry under his contract as modified cost the plaintiff $81,468.21 more than it would have cost if said Perry had carried out his contract; that the annual calculations of the cost of pulp wood made between the plaintiff and the defendant and other like purchasers were based on the expectation that Perry would carry out his contract as modified; that the total amount of spruce pulp wood delivered by the plaintiff to the defendant and other like purchasers under the contract for the year 1904 was 123,270 cords, the amount delivered to the defendant being 4,201 cords; that the total delivery for the year 1905 was 71,201 cords, of which amount 5,549 cords

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were delivered to the defendant; that the total delivery for the year 1906 was 71,373 cords, of which amount 4,116 cords were delivered to the defendant; that the total delivery for the year 1907 amounted to 73,124 cords, the amount delivered to the defendant being 5,601 cords; that the total amount of spruce pulp wood delivered by plaintiff to all its customers under said contracts for four years was 338,968 cords, and the total amount of said wood delivered to the defendant was 19,467 cords; that at the time of the making of the contracts declared on, the larger part of the stock of the plaintiff was held and owned by parties interested in and holding stock in corporations located in and operating mills requiring pulp wood in the Fox River Valley between Neenah and Menasha and Green Bay, to wit, Kimberly-Clark Company, Combined Locks Paper Company, Kaukauna Fibre Company, Interlake Pulp and Paper Company, and Little Chute Pulp Company; that the clause in Contract "B" as follows: "First party has requirements during the year 1905 of 91,800 cords of pulp wood," and similar clauses in other contracts set up in the complaint, relate to pulp wood which the plaintiff had agreed to furnish said corporations; that the plaintiff in each year in which it had contracts as alleged in the complaint procured and brought pulp wood from Wisconsin, Michigan, Minnesota, and Canada; that a considerable part of the pulp wood handled in each year by it was brought to the waters of Green Bay, and that part of same delivered to the defendant was delivered at the port of Green Bay, while that furnished to other of its customers was shipped to them by rail from Long Tail Point or floated up the Fox river to the mills of the purchasers; that Exhibit 1 includes the list of names of all pulp-consuming corporations in the Lower Fox River Valley below Neenah and Menasha and above Green Bay; that the mills in the Fox River Valley using pulp wood now draw and at the times covered by this contract drew their supply of pulp wood from northern Wisconsin, the northern peninsula

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of Michigan, northeastern Minnesota, and quite a large territory in the Dominion of Canada; that said mills at the times herein mentioned used and now use less than twenty-one per cent. of all the pulp wood used by all the paper mills of Wisconsin using pulp wood; that not only the mills in Wisconsin, but other mills in Michigan, Minnesota, and Canada, drew at the times herein mentioned and now draw pulp wood from the same territory; that such other mills in Michigan, Minnesota, and Canada use and have at the times herein mentioned used more than twice the amount of pulp wood used by the mills in the Fox River Valley; that the mills in the Fox River Valley use and at the times herein mentioned have used about ten to twelve per cent. of all the pulp wood drawn from the said source of supply; that during all the times herein mentioned it was practicable for all of the aforesaid mentioned mills to procure their pulp wood from any portion of such territory; that some competitors of the Fox river mills, and especially those located in Canada, were and are more favorably located than said Fox river mills in respect to the cost of labor, the cost of transporting pulp wood to their mills, and the cost of the use of hydraulic power, the only power ordinarily used for manufacturing pulp and products thereof; that the procurement of pulp-wood timber requires the use of a suitable logging outfit, and the work of woodsmen and loggers' camps, and the transportation of pulp wood cut to the places where it is to be used; that neither the plaintiff nor any of the parties with whom it contracted owned loggers' outfits, nor did the plaintiff log the timber sold by it, but contracted therefor with loggers for the purpose of procuring the same for less than it would necessarily expend in doing the work ordinarily done by loggers; that by contracting for a large amount of pulp wood and for the transportation thereof plaintiff was able to procure and deliver wood at the mills in the Fox River Valley for less than the same could have been procured by the Fox river mills contracting

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separately; that such saving in cost enabled the Fox river mills to sell their pulp-wood products to the public at prices proportionately less than they otherwise could and thereby meet the prices of competitors more favorably located in the particulars mentioned; that the plaintiff's articles of association limit its capital stock to $90,000; that the products of the twelve Fox river mills mentioned were and are selling in free competition and to local buyers at the same prices as were and are charged to members of the public in general; that there is and has been for ten years no considerable amount of pulp wood within 100 miles of the Fox River Valley; that within 200 miles of the Fox River Valley there is not pulp wood enough to supply the Fox river mills for more than four or five years; that if the loss on the Perry contract be distributed among the plaintiff's customers for the years 1904 to 1907 inclusive, the defendant's share of the loss would be $4,678.74; that if said loss be apportioned to contracts for the year 1907, the year in which the advances were made to Perry, for which an equivalent in spruce pulp wood was not delivered by Perry, defendant's share of said loss would be $6,240.13. Judgment is demanded on the first cause of action for the larger amount.

The second cause of action is one to recover the sum of $11,595.58 for interest charges because of the failure of the defendant to receive wood on its contracts when tendered to it by the plaintiff, by reason of which the plaintiff was compelled to carry a large amount of money for an unnecessary length of time in the wood purchased by it before receiving returns thereon, and also for balance due on the contract price of said wood. It is unnecessary to set out in detail the allegations of the complaint on this cause of action.

The third cause of action is one to recover an alleged balance claimed to be due on the wood delivered to the defendant under the contract for the year 1909, which contract was made by letter. Under the Perry contract Perry agreed to

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cut on lands tributary to the Tequamen on the south shore of Lake Superior 200,000 cords of spruce pulp wood and deliver the same to the plaintiff during a period of five years. This contract contained the following clauses:

"Eighth. The said company further agrees that it will not buy or attempt to buy of any company or person other than said Perry any spruce pulp wood to be carried by water down the Tequamen river or between Sault Ste. Marie, Michigan, and White Fish Point on the shore of Lake Superior during the term of this contract."

"Ninth. Said Perry further agrees that he will not, during the term of this contract, buy or attempt to buy any spruce pulp wood at any point outside the points above specified wherein the purchaser is not to buy or attempt to buy, Canadian wood excepted."

The defendant interposed a demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action. From an order sustaining such demurrer the plaintiff appeals.

For the appellant there were briefs by *Hooper & Hooper,* attorneys, and separate briefs by *Wm. Ruger,* of counsel, and the cause was argued orally by *Mr. Moses Hooper* and *Mr. Ruger.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

Barnes, J. The defendant contends that the contracts sued on are void under the federal Anti-Trust Act, 26 U. S. Stats. at Large, 209, ch. 647 (3 U. S. Comp. Stats. 1901, p. 3200), which is as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on

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conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Further, that such contracts were made in violation of secs. 1791*j* and 1747*e*, Stats. of Wis., which statutes read as follows:

"Sec. 1791*j*. Any corporation organized under the laws of this state which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its charter or authority to do business in this state canceled and annulled. Every corporation shall upon filing its annual report with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in this section."

"Sec. 1747*e*. Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall

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also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section."

The circuit court held that sec. 7 of the contracts by which the contracting consumers agreed not to purchase any pulp wood from any person, firm, or corporation except the plaintiff, unlawfully restrained trade, in that it took twelve consumers of wood out of the market and operated to the disadvantage of those who had pulp wood to sell by reducing the number of competing buyers.

The principal contention made by respondent's counsel in their brief and on the oral argument is that the contracts evidence a plan or scheme on the part of the contracting parties to control and restrict the output of pulp and paper, to the end that the market might be manipulated and prices raised, and that such purpose is made manifest by the fact that twelve or thirteen large consumers of pulp wood have bartered away their rights from year to year for a series of years to supply their legitimate wants in the way of raw material. It is urged that the plaintiff is a spurious creature, organized for ulterior purposes and to evade the law, and that the real power behind it is a group of manufacturers intent on unduly stimulating competition or suppressing it altogether, as may best suit their lawless wishes, and that the inevitable tendency of the contracts is towards monopoly and unlawful restraint of trade.

The complaint shows that the wood supply furnished to the plaintiff came from the states of Wisconsin, Minnesota and Michigan, and the Dominion of Canada. The contract we think involved interstate commerce, and if so the federal statute is applicable and the case will be treated on that basis. *U. S. v. Reading Co.* 226 U. S. 324, 33 Sup. Ct. 90; *Swift & Co. v. U. S.* 196 U. S. 375, 25 Sup. Ct. 276; *U. S. v. Patten,* 226 U. S. 525, 33 Sup. Ct. 141; *Continental W. P. Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 29 Sup. Ct. 280.

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So far as this particular case goes, we observe very little difference whether the state or federal statutes or both apply.

The case will first be considered on the aspect principally relied on by respondent's counsel and in reference to the so-called Sherman Anti-Trust Law.

The questionable features of the contracts arise out of the fact that they take in twelve or thirteen large consumers of wood and that these consumers have appointed an agent who has the exclusive authority to buy all their pulp wood.

We do not construe the contracts as fixing a price which the plaintiff was to pay for wood. The prices specified in the sixth paragraph are merely an estimate, made in advance, of what the commodity would probably cost, and payment was to be made on the basis of this estimate as the wood was delivered. When the total expense for the year was ascertained, the purchasers were to settle on the basis of the actual cost, which included seven per cent. interest on the capital employed by the plaintiff. If the estimated price was greater than the actual cost the excess was to be refunded by the plaintiff. If the actual exceeded the estimated cost the purchasers were required to make up the deficiency and pay in proportion to the amount of wood purchased. This we deem to be the clear intent and meaning of paragraph 10 of the contract and of the provisions of the same taken as a whole. No other contract could be made if the actual purpose was to secure a supply of wood. The contracts covered future deliveries for a period of a year. Many conditions might arise which would materially affect the supply of wood. A good winter for hauling would tend toward a large supply and a lower price, while an open winter would greatly curtail output and tend to increase the price. The varying conditions of the wood market are reflected in the estimated prices found in the contracts. The estimated price of spruce was $2 per cord higher for 1907 than for 1905, and of hemlock $1.50 per cord higher. The plaintiff would have to pay the going

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prices whatever they were or go without wood. Its net earnings were restricted to seven per cent. on the capital it had invested. We do not understand that there is any serious dispute between the parties as to the intent and meaning of the contract in this regard. Neither do we think there is any doubt that the manufacturers who were parties to contracts like that set forth in the statement of facts attempted to make the plaintiff their sole agent and to give it the exclusive right to purchase their supply of wood. If it appears from the contracts, read in connection with the allegations of the complaint, that the parties had no lawful right to make such agreements, or that the agreements contravene public law, then the contracts are void and the action will not lie because recovery cannot be had on a void contract. *Menominee River B. Co. v. Augustus Spies L. & C. Co.* 147 Wis. 559, 132 N. W. 1118.

The complaint being challenged by demurrer, every reasonable intendment must be made in favor of the pleading. *Downer v. Tubbs,* 152 Wis. 177, 179, 139 N. W. 820; *Jones v. Monson,* 137 Wis. 478, 119 N. W. 179.

"In law every intendment that harmonizes with honesty and fair dealing must be presumed in the light of the alleged facts." *Forest Co. v. Shaw,* 150 Wis. 294, 304, 136 N. W. 642.

Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. *Hobbs v. McLean,* 117 U. S. 567, 576, 6 Sup. Ct. 870; *U. S. v. Cent. Pac. R. Co.* 118 U. S. 235, 6 Sup. Ct. 1038, cited in *Watters v. McGuigan,* 72 Wis. 155, 157, 39 N. W. 382; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 591, 120 N. W. 512.

"When the terms of a contract are indefinite, uncertain, and susceptible of two constructions, and by giving them one construction one of the parties would be subjected to a forfeiture, and by giving them the other no such forfeiture would be in-

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curred and no injustice would be done to the other party, the contract should be so construed as not to create the forfeiture." *Jacobs v. Spalding,* 71 Wis. 177, 190, 36 N. W. 608; *Weidner v. Standard L. & A. Ins. Co.* 130 Wis. 10, 19, 110 N. W. 246; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 590, 591, 120 N. W. 512; *Appleton Iron Co. v. British Am. Assur. Co.* 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; *Wier v. Simmons,* 55 Wis. 637, 13 N. W. 873.

A violation of the federal Anti-Trust Act is made a misdemeanor which is punishable by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

"It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal." *Brown v. State,* 137 Wis. 543, 119 N. W. 338.

It is substantially ruled in some of the federal courts that in close and doubtful cases arising under the Anti-Trust Law and involving intricate questions, the merits will not be passed upon on demurrer nor until all the essential facts are before the court, where such facts may materially aid in determining whether or not the law has been violated. *U. S. v. Winslow,* 195 Fed. 578, applying the equity rule as stated in *Kansas v. Colorado,* 185 U. S. 125, 144, 145, 22 Sup. Ct. 552. This rule of practice is not binding on this court, but does not differ essentially from our uniform holdings in later years as to when a complaint will be held bad on general demurrer.

There is not so much difficulty at the present time in determining what the law is as there is in making the proper application of established rules to the facts in each particular case. There has been a world of decisions on our anti-trust laws, common and statute, in the state and federal

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courts. To attempt to review them all would be a work of supererogation. To harmonize them would be an impossibility. On the federal Anti-Trust Statute, however, our court of last resort has recently spoken in a number of well considered decisions in which the act of Congress has been carefully and learnedly analyzed and its scope defined. *Standard Oil Co. v. U. S.* 221 U. S. 1, 31 Sup. Ct. 502; *U. S. v. American T. Co.* 221 U. S. 106, 31 Sup. Ct. 632; *U. S. v. Patten,* 226 U. S. 525, 33 Sup. Ct. 141; *Standard S. M. Co. v. U. S.* 226 U. S. 20, 33 Sup. Ct. 9; *U. S. v. Reading Co.* 226 U. S. 324, 33 Sup. Ct. 90; *Swift & Co. v. U. S.* 196 U. S. 375, 25 Sup. Ct. 276; *U. S. v. Terminal R. R. Asso.* 224 U. S. 383, 32 Sup. Ct. 507; *Northern S. Co. v. U. S.* 193 U. S. 197, 24 Sup. Ct. 436; *Montague & Co. v. Lowry,* 193 U. S. 38, 24 Sup. Ct. 307; *Continental W. P. Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 29 Sup. Ct. 280. Many other cases might be cited, but a reference to them will be found in the foregoing decisions.

Whatever understanding or misunderstanding may have arisen out of the decisions in *U. S. v. Trans-Missouri F. Asso.* 166 U. S. 290, 17 Sup. Ct. 540, and *U. S. v. Joint Traffic Asso.* 171 U. S. 505, 19 Sup. Ct. 25, it is now definitely decided that the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-Trust Act embraced only acts, contracts, agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and that Congress intended that those words used in the act should have a like significance. *Standard Oil Co. v. U. S., supra; U. S. v. American T. Co., supra.* These decisions have been freely criticised and often denounced, but they are the law of the land. It is more than three years since they were announced, during which time Congress has been in almost continuous session. So far as we know there has not even been any attempt to pass a law de-

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claring that every contract, combination, or conspiracy in restraint of trade is unlawful regardless of the extent of the restraint. We are inclined to agree with respondent's counsel that in the discussion of these cases "the light of reason" has "often been absent."

The real question before us for solution is: Do the contracts referred to, read in connection with the allegations of the complaint, show that they operated to the prejudice of the public interest by unduly restricting competition or by unduly obstructing the due course of trade?

The answer depends on the extent to which competition has been restricted or trade has been obstructed. This must be determined from the existing facts. When the facts are ascertained the question of whether the restraint is reasonable or otherwise is one of law. *Richards v. American D. & S. Co.* 87 Wis. 503, 513, 58 N. W. 787. Sometimes the essential facts may be so clearly shown by the contract involved, if one is involved, that further evidence is unnecessary to show that the restraint is unlawful. There is another class of cases where the contract in itself may present an innocent appearance, but when considered in the light of other facts and circumstances, including the purpose for which it was made, the objects sought to be accomplished and the results actually brought about, the contract may be positively vicious. In such cases the contract constitutes a link in the chain of evidence. There is a third class of cases where the contract involved shows some restriction of competition or some obstruction of trade, but does not show whether such restriction or obstruction is undue and unreasonable or otherwise. In such cases it is necessary to resort to evidence *dehors* the contract to ascertain whether it is void or valid.

The contracts involved in this case would seem to fall within the latter class. If they are reasonably susceptible of an interpretation which would render them lawful, it is the duty of the court to place that interpretation upon them. It is

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argued by counsel for respondent that these contracts place a limitation on the production of pulp and likewise on the output of paper; that there is a federation of interests between the contracting parties; that estimates of the amount of wood required are made so as to effectuate the ulterior purposes of the parties, or it may be the group itself makes the estimates; that the power is centered in this group to dominate the pulp and paper market; that plaintiff is merely a clearing-house for carrying out the unlawful objects of the combine; that the contracts referred to give the plaintiff power to crush competitors and force combinations; that they inevitably tend toward monopoly; that an unlawful restraint is placed upon the contracting consumers, in that they are not permitted to buy any part of their supply of wood under any circumstances. Some other considerations of like tenor and effect are suggested, but the foregoing is a substantially full epitome of the contentions of counsel on the point principally argued. These contracts are roundly and at times extravagantly denounced by counsel.

Defendant asks us to assume altogether too much in passing upon these contracts and the averments of the complaint. This is not an action brought by or in behalf of the public to dissolve an unlawful combination. It is a case where one *particeps criminis* is trying to avoid responsibility to his copartners in crime, if any crime was in fact committed. In berating the plaintiff the defendant is also belaboring itself. It is true, it had no stock in the plaintiff corporation, but if the corporation was organized for an unlawful purpose, the defendant aided, abetted, and assisted it in the execution of such unlawful purpose. The contracts before us covered a period of six or seven years. If the production of pulp wood and of paper was restricted for the purpose of inflating the price of paper or depressing the price of wood, the defendant is as well aware of that fact as is any one else, and whether it is or not the matter is easily susceptible of proof. The de-

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fendant certainly knows how long its mill was shut down for want of pulp wood if it was shut down at all. It can be readily ascertained how long the other mills whose owners made like contracts were shut down for this or any other cause during the period. If no attempt was in fact made during this time to restrict output so as to squeeze up prices abnormally or to do other unlawful acts, that would be pretty convincing evidence that the plaintiff corporation was not organized to juggle the paper market. If the plaintiff has crushed or attempted to crush competitors, or has forced or attempted to force unlawful combinations to control the wood or paper market, these things should be susceptible of proof, but it is not apparent from the contracts or from the complaint that it has done either.

For aught we know it may be shown on the trial that the contracting manufacturers made their estimates large enough to cover their needs without interference from any one; that the estimated amounts were substantially furnished, or that a good-faith attempt was made to supply them; that the exercise of that reasonable diligence which plaintiff agreed to exercise was sufficient to insure a full supply of wood, or at least as much as the mill owners could secure if they were themselves engaged in the work of buying; that the mills affected had all the wood they needed at all times, and that there was no thought of restricting the output of paper or pulp and that there was no restriction in fact and no influence exerted on the paper market whatever by this alleged unlawful combine. It might even be made to appear that the only harm which the parties could do, if they attempted to reduce production, would be to themselves. It might also be made to appear that the plaintiff was organized to further legitimate economies in the cost of the article which the mill men had to offer the consuming public. Manifestly the question under consideration cannot be intelligently decided until the actual facts are before the court, because the complaint and contracts

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do not affirmatively establish the fact that there has been any undue restraint of competition or any undue obstruction of the course of trade. It is possible to imagine many things that might have happened, but the vital question here, after all, is, What has been done? The court should not be asked to draw on its imagination for its facts. The plaintiff has been operating long enough so that its practices should be well known. We do not think the contracts on their face inevitably tend to unduly restrain trade or competition.

There is nothing in itself unlawful in two or more persons appointing a common agent to purchase a commodity which they require and in giving such agent the exclusive right to do the buying. *Nat. D. Co. v. Cream City I. Co.* 80 Wis. 352, 56 N. W. 864; *Kellogg v. Larkin,* 3 Pin. 123; *Wheeler-Stenzel Co. v. American W. G. Co.* 202 Mass. 471, 476, 89 N. E. 28; *Burley T. Soc. v. Gillaspy* (Ind.) 100 N. E. 89; *Reeves v. Decorah F. G. Soc.* (Iowa) 140 N. W. 844; *First Nat. Bank v. Missouri G. Co.* 169 Mo. App. 374, 152 S. W. 378; *Central S. R. Co. v. Cushman,* 143 Mass. 353, 9 N. E. 629; *New York T. R. Co. v. Brown,* 61 N. J. Law, 536, 43 Atl. 100; *Arkansas B. Co. v. Dunn,* 173 Fed. 899; *Anderson v. U. S.* 171 U. S. 604, 613, 614, 19 Sup. Ct. 50; *Connolly v. Union S. P. Co.* 184 U. S. 540, 22 Sup. Ct. 431, read in connection with additional facts stated in dissenting opinion of Justice HOLMES in *Continental W. P. Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 29 Sup. Ct. 280. We do not wish to be understood as approving all that is said in those cases.

Such an arrangement becomes unlawful when it injuriously affects the public, or, in other words, when it unduly restricts competition or restrains trade. Ordinarily the invalidity of such an agreement must be made to appear from facts outside of the contract, because the writing seldom shows the facts necessary to determine whether the restraint is reasonable and permissible or undue and criminal. The circuit

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court thought the contract was unlawful because it took a dozen consumers of wood out of the market and thus materially affected those who had pulp wood for sale, by reducing the number of buyers. The idea of the court was that the contracts had a tendency to reduce the price of wood. This is a contention not very often made in this class of cases, because, if true, it would also have a tendency to reduce the price at which the manufactured article might be sold to the consuming public. However, we think the pulp-wood producer is entitled to protection against combinations which unreasonably depress the price of his commodity, even though the general public might to some extent benefit by the depression.

The complaint shows that the mills for which plaintiff acted as agent used about twelve per cent. of the entire output of wood in the territory in which it made its purchases. It cannot be held as a conclusion of law on these facts that there was an undue restraint of competition. The producers of wood have made no complaint on this score. There may have been an abundance of buyers to insure fair and free competition in bidding and a fair and adequate price for the wood. If so, it could not be said that competition was unduly restricted. The question is one calling for evidence to show how and to what extent it was reasonably probable that those who had wood for sale were affected.

The first cause of action is brought to recover a loss sustained on the Perry contract. The effect of that contract on this cause of action has not been much discussed by counsel. There are three causes of action stated in the complaint, and the demurrer is interposed to the whole complaint, so that if any good cause of action is stated the order appealed from is erroneous. We do not deem it necessary to decide on the validity of that contract, or to what extent, if any, it would affect the plaintiff's right of recovery on its first cause of action should the contract be held void.

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The mere fact that the plaintiff corporation was an unlawful combination would not relieve the defendant from paying for the goods purchased from it, provided the contract of purchase was not in itself unlawful. *Nat. D. Co. v. Cream City I. Co.* 86 Wis. 352, 56 N. W. 864; *Connolly v. Union S. P. Co.* 184 U. S. 540, 22 Sup. Ct. 431; *International H. Co. v. Eaton Circuit Judge,* 163 Mich. 55, 127 N. W. 695; *Chicago W. P. Mills v. General P. Co.* 147 Fed. 491. This being the law, it is not apparent how the defendant can derive any benefit from sec. 1791*j*, Stats. of Wis.

Sec. 1747*e*, Stats. of Wis., is a copy of the federal statute, except that it applies to attempts to monopolize trade and commerce within the state and prescribes a lesser penalty for its violation than is provided for in the act of Congress. It originally appeared as ch. 219, Laws of 1893. Since then it has received substantially the same construction, *sub silentio* at least, that was placed on the federal law in the *Standard Oil* and *Tobacco Cases,* as will be seen from an examination of the following cases decided since the law was enacted: *Cottington v. Swan,* 128 Wis. 321, 107 N. W. 336; *My Laundry Co. v. Schmeling,* 129 Wis. 597, 109 N. W. 540; *Kradwell v. Thiesen,* 131 Wis. 97, 111 N. W. 233; *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631; *Eureka L. Co. v. Long,* 146 Wis. 205, 131 N. W. 412; *Ruhland v. King,* 154 Wis. 545, 143 N. W. 681; *Nat. D. Co. v. Cream City I. Co., supra; Richards v. American D. & S. Co.* 87 Wis. 503, 58 N. W. 787; *Tecktonius v. Scott,* 110 Wis. 441, 86 N. W. 672. If the above statute has any application to the facts in this case, it should receive the same interpretation that was placed on the federal act, from which it was taken, by the supreme court of the United States.

By the Court.—Order reversed, and cause remanded for further proceedings.

KERWIN, J., took no part.

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SCHAUT, Appellant, vs. BARKHAUSEN COAL & DOCK COMPANY, Respondent.

May 23—June 17, 1914.

Master and servant: Injuries: Defective appliances: Unsafe place: Contributory negligence: Questions for jury.

In an action for injuries to an employee who, while engaged in loading buckets of coal in the hold of a vessel, was struck by a piece of coal from a loaded bucket which unexpectedly dumped as it was being hoisted, it was a question for the jury, under the evidence, whether or not he was guilty of contributory negligence in stepping from the shelter of the deck out under the hatchway to resume his work before the bucket had in fact passed safely beyond the hatchway.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Action for personal injury. Plaintiff, aged thirty-five, went to work for the defendant for the first time upon the day of his injury, loading buckets with coal in the hold of a vessel that was being unloaded at defendant's dock. He was, however, familiar with the work he was doing. The bucket in question, which unexpectedly dumped, weighed about 900 pounds empty and about 1,800 pounds loaded. The boat lay on the north side of the dock headed west. On the dock there was a bridge that ran to the edge of the water, from the end of which there was a boom running out over the boat. A carriage running on the bridge and boom held the buckets, and when they reached the end of the boom they were lowered into the hold of the vessel through the hatch by means of a bumper that caused them to drop. When the bucket was filled it was raised to the end of the boom, where it struck a trip that loosened the carriage, and it then ran out on to the boom and bridge and was dumped on the dock where desired. The bail of the bucket was fastened to it behind the center so that there was much more weight in front than there was behind. It was kept from dumping by means of

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a dog, which when released allowed it to dump. The bucket in question had been nicknamed "The Devil" by the men on account of the frequency with which it unexpectedly dumped, but this was unknown to plaintiff. The hatch on the boat being unloaded was thirty-six feet long and eight feet wide running across the boat, or as it lay, from north to south. The boat was forty-five feet beam, leaving a covered space in the hold at each end of the hatch, called the wing, of about five feet. When the buckets are loaded and ready for hoisting the men are expected to step back in under the deck, so as to be out of danger of coal falling therefrom as it is lifted to the boom and until it passes the combing of the hatch. On the day in question the bucket called "The Devil" was loaded, and as it was being hoisted it dumped and a piece of coal struck and injured the plaintiff. There is a sharp conflict in the evidence as to whether when the bucket dumped it had passed beyond the comb of the hatchway, and also as to whether plaintiff was in under the deck or out in the hatchway when he was struck. Some of the evidence of the plaintiff is to the effect that he was in under the deck slightly and that when the bucket dumped it was beyond the combing of the hatch and coal was thrown backwards and struck him. The evidence of the defense is to the effect that plaintiff was from two to three feet out in the hatchway, having started to go to his place of work to clean up coal in the wing, and that the bucket had not passed the hatchway when it dumped. The trial court rejected the evidence of the plaintiff that the coal was thrown backwards as being contrary to physical laws, and granted a nonsuit on the ground of plaintiff's contributory negligence as a matter of law because he had stepped out into the hatchway before the bucket had safely passed from over it. The plaintiff appealed.

For the appellant there were briefs by *Kittell & Burke,* attorneys, and *Victor I. Minahan,* of counsel, and oral argument by *J. A. Kittell.*

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For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin* and *Jeremiah Clifford.*

VINJE, J. The only question litigated on the appeal was plaintiff's contributory negligence, and the greater part of the effort of counsel on both sides was directed to the question of whether or not coal could be thrown backwards when dumped, under the circumstances in which it was dumped in this case. We shall assume that the trial court was correct in holding that it could not, and we shall dispose of the case upon the theory that the bucket had not passed completely out from over the hatchway when it dumped and that plaintiff had made a step or two out into the hatchway when he was struck. The question arises, Can plaintiff be held to be guilty of contributory negligence as a matter of law under such circumstances? The evidence shows that a bucket is loaded about every four minutes, and that as soon as it has safely passed from over the hatchway the men are required to clean up coal in the wings or other places where it is needed until another bucket is ready for loading. The men are expected to step out of the hatchway while a bucket is being hoisted and to remain out from under it until it has safely passed beyond the hatchway so that there is no danger from falling coal. It is obvious that it requires close observation and some judgment to determine when a bucket has safely passed a hatchway. The boom ran out over the center of the hatch, and the buckets, when they reached it and began to travel thereon, would be a considerable distance above where the men stood in the hold of the vessel. The speed of the bucket, the distance of the end of the boom from the hold of the boat, and the position of the man looking at the disappearing bucket would all affect the question of when it had passed out of danger. Under such circumstances it seems to us it was a question for the jury to say whether or

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not plaintiff was guilty of contributory negligence in stepping out before he was safe. Work must necessarily be active when boats are unloaded, and there is not much time for careful observation and examination. Diligence if coupled with ordinary care ought not to lessen the chance of recovery from an injury sustained while at work. Plaintiff testified that he looked at the bucket and thought it had passed the hatch when he started to go to clean up. Evidently he was mistaken, but the mistake does not show negligence as a matter of law. Inferences to the effect that he was in the exercise of ordinary care when he stepped out to resume work may reasonably be drawn from the situation that existed owing to the difficulty of accurately determining the exact line between safety and danger. We think it was peculiarly a question for the jury to determine whether or not he was in the exercise of ordinary care at the time he was injured, and for that reason shall forbear to comment in detail upon the evidence. In reaching this conclusion we have not forgotten the fact that this bucket had dumped twice before that day while plaintiff had been at work. This is a circumstance that must be weighed by the jury together with the other facts and circumstances touching the question of plaintiff's contributory negligence.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

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GAUGER, Respondent, vs. GAUGER, Appellant.

May 23—June 17, 1914.

Divorce: Division of property: Discretion of trial court: Proportion to be awarded to wife: Unnecessary appeal: Costs.

1. The division of property upon the granting of a divorce is peculiarly a matter resting in the discretion of the trial court, subject to such rules as have been established by the supreme court.
2. In general, a clear third of the whole property to be divided is a liberal allowance to the wife, subject to be increased or decreased according to special circumstances.
3. In this case the trial court, after giving due weight to all matters proper to be considered, having divided the property about equally between the husband and wife, such division is *held* to be obviously fair to the wife.
4. Under such circumstances, there being no good reason why the wife should have appealed to the supreme court, the husband is not, as he would be in ordinary cases, charged with her costs, other than clerk's fees, upon affirmance of the judgment.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action for a divorce. The plaintiff husband, *Herman Gauger,* in due form pleaded a good cause for a divorce. Defendant, *Katie Gauger,* duly joined issue in respect thereto and counterclaimed for a divorce on the ground of cruel and inhuman treatment. She prevailed and judgment was granted in her favor, and a division of property was adjudged.

The parties had lived together for some over twenty years. At the time of the marriage neither of the parties possessed any property to speak of. They commenced so living on a farm, the property of defendant's mother. His mother gave him $2,000 with which to acquire such farm and her mother gave her the farm personal property valued at about $700, and made pecuniary concessions as to the price of the farm

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and terms of payment. By united efforts of the parties they improved and worked the farm for a period of about fifteen years and then sold it and moved to the city of De Pere. At that time they possessed around $10,000 in money and property clear from all debts. They have two children, both married and living in houses of their own. When the farm was acquired it was worth $7,000. The personal property was worth somewhat in excess of $700. The purchase price of the farm was $5,000 and the excess over that amount was a gift from defendant's mother. The deferred amount of $3,000 was allowed to run at four per cent. in consideration of defendant being the vendor's daughter. At the time of the division, the property possessed by the parties was somewhat less than the amount they had when the farm was sold. The latter value was about $9,000 subject to debts to the amount of $1,288. The property consisted of a note and mortgage running for some time without interest and of the value of about $2,800, a house and lot, valued at $3,500, the title to which had been vested in defendant, a note of $700 made by one of the sons, and a small house and eleven lots, valued at $2,000. The note and mortgage was for the entire purchase money due from one of the sons for a farm the parties sold to him. At the date of the judgment the parties were each about fifty years of age and in fair health. The court decided that, under the circumstances, a fair division of the property required it to be distributed about equally. To that end defendant was given the note and mortgage and the small house and the lots, while he was required to pay the debts and costs and attorney's fees amounting to $115.20, leaving him a net amount of $4,096.80. She was awarded the home which cost some $4,300 and was valued at $3,500. Defendant was dissatisfied with such division because, when the farm was sold, she was given $1,000, which, some time thereafter, she returned to plaintiff for investment in property which he took title to. It was the judgment of the

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court that the property should be dealt with as an entirety. This appeal was taken solely for relief in respect to the property element.

M. E. Davis, for the appellant.

For the respondent there was a brief by *Kittell & Burke,* and oral argument by *J. A. Kittell.*

MARSHALL, J. The division of property, in a case of this sort, is peculiarly a matter resting in the discretion of the trial court, subject to such rules as have been established by this court for guidance in respect to the matter. Therefore, the trial determination must prevail unless clearly characterized by mistake or some manifest error respecting the detail facts upon which it rests, or disregard of established guides, amounting to a pretty clear want of judicial discretion or judgment. *Newton v. Newton,* 145 Wis. 261, 130 N. W. 105.

In making a division of property in a divorce action the ages of the parties, their condition of health, their competency to earn money, the manner the property was acquired, the situation as to probable family burdens after the divorce, the nature of the property, and all other circumstances bearing on the question of an equitable distribution, are to be taken into consideration. *Harran v. Harran,* 85 Wis. 299, 55 N. W. 400.

The statute, sec. 2364, requires the division to be on a fair basis, having due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the particular case, "all property of the husband and the property of the wife derived from him" to be considered as the subject to be dealt with.

In case of property having been contributed by or in behalf of the wife to the family possession, the title being vested in the husband by her consent and merged with his property,

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and subsequently the whole entirety changed in form by sales and reinvestments, the earnings of the husband being added from time to time and ending by the title to part of the possessions being vested in the wife, all is to be treated as substantially an entirety, due consideration being given to the circumstances of its origin. *Gallagher v. Gallagher,* 89 Wis. 461, 61 N. W. 1104.

There is no precise measure by which to determine the amount to be awarded to a divorced wife out of the subject for division.

The nearest approach thereto is this: Except in some extraordinary circumstances, the maximum for the wife is one half. That may be reduced to one third or even less. *Williams v. Williams,* 36 Wis. 362; *Varney v. Varney,* 58 Wis. 19, 16 N. W. 36. The general level to start from is one third. Since the early suggestive guide in respect to the matter, it has been pretty well established that a clear third of the whole is a liberal allowance to the wife, subject to be increased or decreased according to special circumstances. *Edleman v. Edleman,* 125 Wis. 270, 272, 104 N. W. 56.

Applying the foregoing to the facts as stated, it will be seen that the learned circuit judge carefully followed the guides found in the statute and the decisions of this court. By reference to an opinion filed by him, that is made clear beyond room for reasonable controversy. It was eminently proper to treat the property as an entirety, as was done, to reduce it to money value, as near as practicable, to deduct therefrom the indebtedness, equitably and legally chargeable thereto, and divide the balance, having reference to all the matters to which we have referred. The net money value was substantially $6,594. Regardless of modifying circumstances, appellant's share would have been $2,198, and respondent's $4,396. The valuations were conservative. The full face value was placed on the property awarded to the husband. He was charged with present indebtedness, equal to

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nearly one third thereof, and required to face a pending burden for public improvement of some eighty per cent. of the value of the part valued at $2,000,—a large sum which would have to be provided in money. It is argued that a corresponding enhancement of value would result from the improvement; but the many disappointments in such cases are almost, if not quite, matters of common knowledge. One without means to pay for such large public improvements must face the danger of being compelled to sell at any price obtainable. The other part of the property awarded to respondent was an indebtedness from his son. Quite likely the trial court placed a greater value thereon than respondent could realize. It evidently was not an available asset. On the whole, doubtless, respondent would be far better off, contingent upon his handling his property with prudence, if he had been awarded $3,000 net instead of the property adjudged to him subject to present and impending incumbrances. On the other hand, appellant, in getting the home property at some $800 less than it cost and clear from any burden, may well be considered as having received a present money value of $3,500. On the whole, the trial court seems to have given due weight to her original contribution to the family capital, considered the losses by depreciation during the married life, which seem to have amounted to some $2,000 by reason of the sale of a farm to the son for $1,200 less than cost and the valuation of the home at $3,500, whereas it cost $4,300, and have considered all other circumstances bearing on the subject, and resolved such uncertainties as remained in his mind in her favor.

We do not overlook the suggestion that appellant was given the home property without money to maintain herself therein; but she is not compelled to maintain it or live in it. In her circumstances it would probably be folly to attempt it. The record shows the property is rented and that she and her mother live together and that the latter shares the expenses.

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We are constrained to hold that there was no very good reason for prolonging this litigation by refusing to submit to the fair disposition of the property made by the trial court. Ordinarily, in appeals of this kind, the husband is required to pay the expenses of both sides, but that rule should not be so administered as to encourage such continuances of litigation. In case of absence of errors of law and a reasonably fair treatment of the case on the facts, there is no substantial basis for burdening the husband to enable the wife to carry on further adversary proceedings by an appeal to this court. *Von Trott v. Von Trott,* 118 Wis. 29, 41, 94 N. W. 798. The record shows that respondent was required to pay full costs taxed in favor of appellant in the court below, amounting to $40.20, also to pay $75 for services of her attorney. He now must prevail upon the ground that the division complained of is not only right, but, we must say, obviously fair. Under those circumstances, to burden him with costs in this court in excess of the clerk's fees would hardly be justifiable.

By the Court.—The judgment is affirmed without costs to either party, except the respondent will pay the clerk's fees.

THOMAS, Appellant, vs. CITIZENS NATIONAL BANK OF POCOMOKE CITY, MARYLAND, imp., Respondent.

May 23—June 17, 1914.

Bills and notes: Sale of draft to bank: Evidence: Garnishment: Title to money: Jurisdiction: Nonresident intervener: Property not in state: Denial of jury trial: Harmless error.

1. Evidence that a sight draft was indorsed by the drawer for deposit to his credit in a bank which had previously obtained a guaranty of the payment of the draft and which credited the drawer with the amount thereof as cash, together with other direct testimony, is *held* to support a finding by the trial court

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to the effect that there was a completed sale and transfer of the draft to the bank, notwithstanding the fact that the bank, after being notified of its nonpayment, attempted to charge the draft back to the drawer.

2. The impounding of property or money by garnishment must be accomplished by the process when the suit is instituted under the conditions provided by the statutes.
3. The appearance of a nonresident in a court of this state to assert his right to property in this state which has been garnished, cannot give the court jurisdiction to garnish property or a debt situated outside of the state.
4. Denial of a jury trial was not prejudicial error in a case where the rights of the parties rest on undisputed evidence and were for determination upon the record by the court.

APPEAL from a judgment and an order of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is a garnishment action begun in justice's court and appealed to the circuit court. The action in circuit court was tried to the court, which found that the funds sought to be impounded were not liable to garnishment and awarded judgment accordingly. The material facts are not disputed.

It appears that the plaintiff, *A. L. Thomas,* of Green Bay, Wisconsin, purchased of the Peninsula Produce Exchange of Maryland two carloads of potatoes. On the day of shipment the Produce Exchange drew its draft upon the plaintiff in favor of the *Citizens National Bank of Pocomoke City, Maryland.* This bank at the direction of the Produce Exchange requested a guaranty of the draft, and the McCartney Bank of Green Bay had by telegram to the *Citizens Bank of Pocomoke* guarantied payment of this draft, and thereafter the *Citizens Bank* received the following draft dated July 12, 1910, at Pocomoke City:

"At sight pay to the order of *Citizens Nat'l Bank* four hundred and thirty-six and 80/100 dollars, value received, and charge the same to account of Peninsula Produce Exchange of Md. W. C. CULLEN, Sect. & Treas.

"To the Thomas Produce Co., Green Bay, Wis."

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One of the indorsements on the back is as follows: "For deposit to the credit of the Peninsula Produce Exchange of Md. W. C. Cullen, Sect. & Treas." The *Citizens Bank* sent the draft through its correspondents to the Kellogg National Bank at Green Bay and it was paid by the McCartney Bank, which bank had previously received a check from *Thomas* for the amount of the draft. Before the money was sent *Thomas* commenced an action to recover damages for failure of the Produce Exchange to ship potatoes of good quality and garnished the Kellogg National Bank. In justice's court *Thomas* recovered judgment for damages against the Produce Exchange for $161.80. The *Citizens Bank* intervened in the garnishment action, claiming that it owned the proceeds of the draft. The amount paid by the plaintiff to the Kellogg Bank was paid into court to abide the result of the action. The trial court found that the money paid on the draft to the Kellogg Bank at the time it was garnished was the property of the *Citizens National Bank of Pocomoke City* and that the Kellogg Bank had no property in its possession belonging to the Produce Exchange and that the garnishee was in no way indebted to it. The court awarded judgment against the plaintiff and in favor of the interpleaded defendant, the *Citizens National Bank of Pocomoke City, Maryland,* for costs, and reversed the judgment of the justice's court, and after judgment entered an order directing the plaintiff to restore to the *Citizens National Bank of Pocomoke City* $169.03 with interest from January 21, 1911, the amount which the plaintiff had received of the funds garnished under order of the justice's court. This is an appeal from the judgment and order entered by the circuit court.

Sol. P. Huntington, for the appellant, contended, *inter alia,* that garnishment is ordinarily an equitable proceeding. It takes the place of the former creditors' action, and amounts to an equitable levy. *La Crosse Nat. Bank v. Wilson,* 74 Wis. 391, 43 N. W. 153; *Delaney v. Hartwig,* 91 Wis. 412,

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64 N. W. 1035; *Bragg v. Gaynor,* 85 Wis. 468, 55 N. W. 919. The impleaded defendant having under sec. 3723*b*, Stats., stepped into the shoes of the garnishee defendant and asserted a claim to this money, at the same time being indebted for the *identical* money to the Produce Exchange, it is liable as garnishee. The court erred in ordering plaintiff to restore to the *Citizens Bank* the property theretofore received by him. Domestic creditors will be protected to the extent of not allowing property or the funds of a nonresident debtor to be withdrawn from the state before such domestic creditors have been paid. Every country will first protect its own citizens. *Woodward v. Brooks,* 128 Ill. 222, 20 N. E. 685; *Catlin v. Wilcox S. P. Co.* 123 Ind. 477, 24 N. E. 250; *Chafee v. Fourth Nat. Bank,* 71 Me. 514, 36 Am. Rep. 345; *Disconto Gesellschaft v. Umbreit,* 127 Wis. 651, 106 N. W. 821.

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *John W. Gauerke.*

SIEBECKER, J. The circuit court found that the Kellogg Bank was not indebted to the Produce Exchange nor had property in its possession belonging to the Produce Exchange when it was summoned in garnishment. This finding is assailed by the plaintiff on the ground that the transaction between the Produce Exchange and the *Citizens Bank of Pocomoke* did not constitute a sale and purchase of the draft. It is said in argument that the trial court came to this conclusion on the fact alone that the *Citizens Bank* credited the Produce Exchange in the passbook for the amount of the draft when it was issued and delivered by the Produce Exchange. The findings of the court indicate and its opinion discloses that this claim is not well founded. The court expressly considered all of the facts and circumstances that entered into the transaction between the Produce Exchange and the *Citizens Bank* and was thereby led to the conclusion that

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the transaction constituted a sale and transfer of the draft by the Produce Exchange to the bank. The indorsement of the draft, "For deposit to the credit of the Peninsula Produce Exchange," is pretty direct and clear evidence that the Produce Exchange intended to sell and transfer the draft to the bank, and the credit given it by the bank for the amount of the draft which the bank paid in money on the checks of the Produce Exchange is well nigh conclusive in its effects of a completed sale and transfer between the parties of the draft and its proceeds. Then there is the positive testimony of the officer of the Produce Exchange to the effect that the draft was sold to the bank, and also the testimony of the bank's cashier that the bank received the draft, treated it as a discount, and paid the Produce Exchange in money on checks. These facts established a completed sale and transfer of the draft unless it appeared that there was a special agreement showing that the title to the draft and proceeds thereof was not under these circumstances to pass to the bank. Appellant's claim that these facts can all be harmonized with the custom of banks in handling drafts of this nature for collection only is not sustained, because the evidential facts adduced refute the inference that this draft was merely transferred for collection and show affirmatively that the parties to the transaction intended it as a sale and vested title thereto and the proceeds thereof in the *Citizens National Bank.* The fact that the bank attempted to charge the draft back to the Exchange after being notified of nonpayment when it was presented is not in itself sufficient to neutralize the conclusive character of the sale and transfer; it is rather a subsequent step by one party to the sale to compel repayment by the drawer of the draft in case of its dishonor. We are persuaded that the trial court properly found that the transaction of the parties constituted a sale and purchase of the draft and that the proceeds in the hands of the Kellogg Bank was the property of the *Citizens Bank. Aebi v. Bank of Evans-*

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ville, 124 Wis. 73, 102 N. W. 329; *American Thresherman v. Citizens Bank,* 154 Wis. 366, 141 N. W. 210; *Ditch v. Western Nat. Bank,* 79 Md. 192, 29 Atl. 72, 138.

The Citizens National Bank intervened and at the time that the summons was served was indebted to the Produce Exchange in the sum of $151 on an open running banking account. The bank and Produce Exchange are nonresidents of Wisconsin and the situs of the debt against the bank would be Pocomoke City, Maryland. The impounding of property or money by garnishment must be accomplished by the process when the suit is instituted under the conditions provided by the statutes governing and regulating garnishment proceedings. We cannot perceive how the proceeding can reach property or a debt in the state of Maryland. The *Citizens Bank* appeared in the action to assert its rights to the property in this state which had been impounded by the garnishment proceeding. An appearance of a nonresident in the courts of this state cannot operate to give the court jurisdiction to impound property that cannot otherwise be reached because it is situated outside of the state and therefore not subject to garnishment by the courts of this state. *Kuehn v. Nero,* 145 Wis. 256, 130 N. W. 56.

The contention that the court committed prejudicial error in denying the plaintiff's request to have the action tried by a jury cannot prevail. Assuming, without deciding, that a right to a jury trial exists, it did not operate prejudicially in this case, because the rights of the parties rest on undisputed evidence and were a matter for determination upon the record by the court. The court properly ordered the plaintiff to restore to the bank the amount the justice's court had improperly turned over to him. The justice's court judgment of necessity was wholly reversed, and the plaintiff had no right to any moneys received under it.

By the Court.—The judgment and order appealed from are affirmed.

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PETERSON, Respondent, vs. WIDULE, County Clerk, Appellant.

May 25—June 17, 1914.

Constitutional law: Regulation of marriage: Preventing transmission of disease: Construction of statutes: Classification: Statute applicable to males only: Examination of applicant for marriage license: "Recognized tests:" What included: Religious liberty: Due process of law: Trial by jury: Partial invalidity of statute.

1. The state may control and regulate by reasonable laws the marriage relation, and may prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases which are liable to be transmitted to the spouse or inherited by the offspring.
2. A constitutional law enacted by the legislature establishes public policy on the subjects covered by it, and that policy is not open to question by the courts.
3. The courts must sustain a law unless its unconstitutionality is beyond reasonable doubt.
4. If a law is open to two constructions, one of which will condemn it and the other save it from condemnation and accomplish the legislative purpose, it must be given the latter construction.
5. A law directed against males only, for the purpose of preventing the transmission of venereal diseases, is based upon a valid classification and is not discriminatory.
6. Sec. 2339*m*, Stats. 1913, requires every male applicant for a marriage license to be examined as to the existence in him of "*any* venereal disease;" then makes unlawful the issuance of the license if he fails to present a physician's certificate that he is free from "*acquired* venereal diseases" (the word "acquired" having been inserted by an amendment to the bill as first introduced); and then prescribes the form of such certificate, which form contains the statement that the applicant is free from "*all* venereal diseases." *Held*, that the confusion in the language will not prevent the court from giving effect to the clear intent of the legislature that the law should cover only *acquired* venereal diseases as that term is understood in medical science, and that the form of the certificate is to be construed as covering only such diseases.

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7. It must be presumed that in enacting said statute the legislature had a definite and certain end in view, that they did not intend to prohibit marriage, but intended rather to safeguard it by the use of practicable and reasonable means.
8. Within the meaning of sec. 2339*m*, Stats. 1913, "clinical tests" of a disease are those which may be observed by the bedside or upon the general examination of the patient, not depending upon the use of instruments, apparatus, or chemical examinations; and "laboratory tests" are those which call for proofs by means of instruments, apparatus, or chemical reactions.
9. In the provision of said sec. 2339*m*, Stats. 1913, requiring, as a prerequisite to the granting of the physician's certificate, physical examination and "the application of the recognized clinical and laboratory tests of scientific search," the words "recognized tests" are construed as referring to the tests recognized and used by the examiners empowered to make them, *i. e.* licensed physicians who are thirty years of age, and not to include a test—known as the Wassermann test—which, as the legislature is presumed to have known, is highly technical, difficult, and expensive, can be made by very few of the general practitioners of the state, and cannot be made for the statutory fee of $3.
10. Said statute does not interfere in any respect with religious liberty.
11. The provisions in said statute for a trial before the county judge, without a jury, in case of a refusal of the certificate of health, afford sufficient protection to the applicant and do not involve any denial of due process of law.
12. The fact that the fee of $3 fixed by the law for the examination is very meager is not a sufficient ground for holding the law unconstitutional.
13. If the penalties provided by sub. 6 of said sec. 2339*m*, Stats. 1913, are extreme, that fact does not invalidate the other parts of the statute, such penalties not being an indivisible portion of the law nor forming in any sense a compensation for the other clauses.

MARSHALL and VINJE, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Mandamus action. The petitioner applied to the defendant as county clerk for a marriage license, and received a blank form of certificate, such as is required by sec. 2339*m*,

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Stats. He presented himself to four physicians for examination to determine whether he had a venereal disease, tendering each of them the statutory fee of $3. Each physician refused to make the examination because such fee was insufficient compensation for making the Wassermann test for syphilis, which the physicians considered as necessary to be made before they could make the certificate. The petitioner thereupon renewed his application for a marriage license without a certificate, but was refused, and brought this action to compel the issuance of a license. Return was made to the alternative writ to the effect that the petitioner had not produced the required certificate. Testimony of ten physicians was taken, and the court made the following findings of fact and conclusions of law:

"1. That in medical science there are three diseases designated under the one head of venereal diseases, viz.: syphilis, gonorrhea, and chancroid;

"2. That the term 'hereditary' refers to such a disease received by the individual at the time of, or prior to birth;

"3. That 'acquired' is restricted to such a disease starting in the individual after birth;

"4. That 'clinical' refers to what may be discovered by the observation of the physician from the body of the individual and without the use of instruments;

"5. That 'laboratory tests' are those requiring the use of instruments and certain methods of demonstrating the presence or absence of such diseases.

"6. That among such laboratory tests is the one known as the 'Wassermann test;' that it has been known to the medical world about seven years; is a standard, well recognized and very efficient test, and a great many of such tests are being made by those familiar with the use thereof; that it will determine with practical certainty in from seventy to ninety per cent. of the cases tested, the existence of syphilis, and that it is necessary and proper in many cases where there are some clinical evidences.

"7. That a male person over eighteen years of age might be possessed of syphilis in a form transmissible to his wife

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or offspring without such condition being discovered by a 'clinical' test.

"8. That in the event last mentioned the Wassermann test is efficient, practical and necessary in order to determine as nearly as can be the presence or absence of venereal diseases.

"9. That the Wassermann test requires a special laboratory apparatus and equipment.

"10. That there are now, out of the over 3,000 physicians in the state of Wisconsin, not to exceed twenty-five, and among the over 300 in Milwaukee county not to exceed six, who are equipped and prepared for the Wassermann test.

"11. That the maximum fee of $3 prescribed in the chapter that a physician may charge and receive for such examination and certificate is unreasonably small for the making of the Wassermann test. This finding having been conceded by the counsel for the state and defendant, upon the trial.

"And as conclusion of law:

"That ch. 738 of the Laws of 1913, entitled 'An act to create section 2339*m* of the Statutes, relating to marriage and venereal diseases,' is an unreasonable and material impairment of the inalienable right of fit and proper persons to enter into the marriage state and that it is in violation of the rights secured by section 1, article I, and section 18, article I, of the constitution of the state of Wisconsin and therefore void, and no defense to the defendant in his refusal to grant petitioner a marriage license, and that the petitioner is entitled to the peremptory writ of *mandamus,* as prayed in the petition, and judgment is ordered accordingly."

From this judgment the county clerk appeals.

Sec. 2339*m,* Stats., is as follows:

"1. All male persons making application for license to marry shall at any time within fifteen days prior to such application, be examined as to the existence or nonexistence in such person of any venereal disease, and it shall be unlawful for the county clerk of any county to issue a license to marry to any person who fails to present and file with such county clerk a certificate setting forth that such person is free from acquired venereal diseases so nearly as can be determined by physical examination and by the application of the recognized clinical and laboratory tests of scientific search. Such

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certificate shall be made by a licensed physician, shall be filed with the application for license to marry, and shall read as follows, to wit:

"I, ... (name of physician), being a legally licensed physician, do certify that I have this .... day of ...., 19.., carefully and thoroughly examined .... (name of person), having applied the recognized clinical and laboratory tests of scientific search and find him to be free from all venereal diseases so nearly as can be determined.

"..... ....

"(Signature of physician)

"2. Such examiners shall be physicians duly licensed to practice in this state, shall be persons of good moral character and of scientific attainments and at least thirty years of age. The fee for such examination, to be paid by the applicant for examination before the certificate shall be granted, shall not exceed three dollars. The county physician of any county shall, upon request, make the necessary examination and issue such certificate, if the same can properly be issued, without charge to the applicant, if said applicant be indigent.

"3. Whenever there is a dispute or disagreement regarding the findings of any medical examiner, laboratory tests shall be made in the state laboratory of hygiene from material submitted by such examiner, and the findings of said laboratory shall be accepted as evidence of the presence or absence in the person examined of any venereal disease.

"4. In any case wherein the certificate of health required by subsection 1 of this section shall be refused and the applicant shall make and file with the county clerk of the proper county an affidavit setting forth the fact that such applicant has not had a fair and impartial examination and that he is entitled to such certificate of health, it shall be the duty of such county clerk to certify such proceedings, at once, to the county court of such county without formality or expense to such applicant. Such application shall be heard by a judge of said court, at the earliest time practicable, without a jury in court or in chambers, during the term or in vacation as the case may be. Notice of the time and place of such hearing shall be given to such applicant by mail. A certified copy of an order of such judge upon his findings in such matter determining that such applicant is entitled to such certificate

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of health presented and filed with such county clerk, shall have the same force and effect as such certificate and such county clerk shall thereupon issue a license to marry, to such applicant.

"5. Any person a resident of this state, who with intent to evade the provisions of this act shall go into another state and there have a marriage solemnized and who within one year from date of such marriage shall return and reside in this state, shall upon information or knowledge to the district attorney of any county be required by him to file with the county clerk of any county in which such person may be then a resident, a certificate of examination from such physician as set forth in this section. Any person violating the provisions of this subsection shall be punished by imprisonment in the county jail not less than thirty days nor more than one year.

"6. Any county clerk who shall unlawfully issue a license to marry to any person who fails to present and file the certificate provided by subsection 1 of this section, or any party or parties having knowledge of any matter relating or pertaining to the examination of any applicant for license to marry, who shall disclose the same, or any portion thereof, except as may be required by law, shall upon proof thereof be guilty of a felony, and shall be punished by imprisonment in the state prison not less than one year nor more than five years.

"7. Any physician who shall knowingly and wilfully make any false statement in the certificate provided for in subsection 1 of this section shall be guilty of perjury and upon conviction shall be punished as for perjury, and a conviction under this subsection shall revoke the license of such physician to practice in this state."

For the appellant there was a brief by *Edw. C. Yockey,* district attorney, *Henry S. Sloan,* assistant district attorney, as attorneys, and the *Attorney General* and *Byron H. Stebbins,* assistant attorney general, of counsel, and oral argument by the *Attorney General, Mr. Stebbins,* and *Mr. Sloan.*

For the respondent there was a brief by *Runkel, Runge & McLogan,* and oral argument by *Carl Runge* and *J. M. McLogan.*

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WINSLOW, C. J. The case presents simply the question whether the so-called eugenics law is constitutional. It was held unconstitutional by the trial court because (1) it is an unreasonable restriction upon the inalienable right of marriage; (2) it impairs the inherent right to enjoy life, liberty, and the pursuit of happiness; (3) it interferes with religious freedom.

Before taking up for discussion the specific objections to the law, some general, fundamental propositions, which are not open to question, may profitably be stated.

The power of the state to control and regulate by reasonable laws the marriage relation, and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable. To state this proposition is to establish it. Society has a right to protect itself from extinction and its members from a fate worse than death. If authority be needed to support this proposition, reference may be made to Freund on Police Power, § 124, and cases there cited.

When the legislature passes a constitutional law, that law establishes public policy upon the subjects covered by it, and that policy is not open to question by the courts.

The courts must sustain a law unless its unconstitutionality be beyond reasonable doubt. If the law be ambiguous or open to two constructions, that construction which will save it from condemnation and accomplish the legislative purpose is always to be adopted in preference to a construction which makes it unconstitutional.

Neither the legislative idea nor the legislative purpose in the passage of the present law can be a matter of serious doubt. The *idea* plainly was that the transmission of the so-called venereal diseases by newly married men to their innocent wives was a tremendous evil, and the *purpose* just as plainly was to remedy that evil so far as possible by prevent-

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ing the marriage of men who upon examination were found to possess such diseases.

An argument is made that the law is void because the classification is unreasonable, arbitrary, and discriminatory, in that it singles out men about to marry and makes a class of them, there being, as it is argued, no substantial differences which suggest the propriety of different legislative treatment between men who are about to marry and women who are about to marry. Theoretically the argument is strong. Women who marry and transmit a loathsome disease to their husbands do just as much harm as men who transmit such a disease to their wives. If women were in fact doing this thing as frequently or anywhere nearly as frequently as men the argument could hardly be met. The medical evidence in the case, however, corroborates what we suppose to be common knowledge, namely, that the great majority of women who marry are pure, while a considerable percentage of men have had illicit sexual relations before marriage, and consequently that the number of cases where newly married men transmit a venereal disease to their wives is vastly greater than the number of cases where women transmit the disease to their newly married husbands. Classification is not to be condemned because there may be occasional instances in which it does not fit the situation; it is proper if the great mass of situations to which the law applies justify the formation of a class and the application of some special or different legislative provisions to that class. Classification can rarely be mathematically exact. The question is not whether in some individual instance there is any perceptible distinction, but "whether there are characteristics which in a greater degree persist through the one class than in the other," and which justify the different treatment. *State v. Evans,* 130 Wis. 381, 110 N. W. 241. That there are such characteristics in the class of unmarried men is as certainly true as it is discreditable to the male sex.

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It follows that legislation directed against males alone for the purpose of preventing the transmission of venereal diseases is clearly within the police power and just as clearly is not discriminatory. The only question to be considered is whether the law which attempts to accomplish the purpose is unreasonable or unduly invades constitutional rights in its methods of enforcement.

In considering this question it will be profitable in the beginning to determine what diseases the law covers. It will be noticed that the first subsection requires the prospective husband, within fifteen days previous to his application for license to marry, to be examined as to the existence in him of "*any* venereal disease." The law then makes it unlawful for the county clerk to issue a marriage license to such person if he fails to present a certificate setting forth that he is free from "*acquired* venereal diseases," and then prescribes the form of such certificate, which form contains the statement that the applicant is free from "*all* venereal diseases."

This seems quite confusing. According to the medical testimony and the dictionaries, there are three separate diseases (which, however, may coexist) generally known as "venereal diseases," viz. gonorrhea, chancroid (or local contagious ulcers), and syphilis. While some of the physicians say that syphilis is not a venereal disease in the scientific sense, especially when it is inherited or affects parts of the body other than the sexual organs, it seems to be quite well agreed that it is a venereal disease in the generally accepted use of that term, and hence is included within the provisions of the law in question. There is a distinct form of syphilis, however, termed inherited, which is or may be present in the children of syphilitic parents, and so it is true that there are in fact two well recognized forms of syphilis, *i. e.* the acquired and the inherited, the acquired being understood in medicine as that form which "is obtained otherwise than by inheritance or during the process of birth." This distinction

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throws considerable light on the meaning of the law. The word "acquired" has, it seems, a meaning in medical science. Possibly it is not a technical word within the meaning of sub. 1 of sec. 4971, Stats., but certainly when it is deliberately used in a statute which deals with medical subjects it would seem that it must carry its accepted meaning in medical science. This conclusion becomes more satisfactory when the history of the law is examined. As first introduced in the senate (Bill No. 611 S.) it did not contain the word "acquired," but provided that the applicant must obtain and present to the county clerk a certificate that he is free from venereal diseases. In substance the first section then provided that an applicant for a marriage license must first be examined as to the existence or nonexistence of any venereal disease, obtain a certificate that such person is free from "venereal diseases as near as," etc., and that the form of the certificate must contain the words "free from all venereal diseases so nearly as can be determined." The bill received several amendments in the senate, among which was an amendment inserting the word "acquired." It would be idle to argue that this amendment was unimportant or immaterial. It must have had a serious and definite purpose. It unquestionably meant to eliminate from the operation of the act all forms of venereal diseases which were inherited and limit the examination and the certificate to those which were acquired.

The fact that the wording of the certificate was not changed at the same time is unfortunate, but not necessarily fatal to the legislative purpose. When, as here, that purpose is made clear by the history of the bill, confusion and even contradiction in language will not hinder the court from giving effect to that purpose. We deem it clear that the act as passed was intended to cover only acquired venereal diseases as understood in medical science, and that the form of physician's certificate in the act is to be construed as covering only such diseases.

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The principal objection made to the act and the objection which the circuit judge found to be fatal is the objection that it requires in every case the use of a very delicate and expensive blood test, known as the Wassermann test, before the certificate required can be signed. It is claimed, and rightly claimed, under the evidence that this test is a highly technical test, requiring special training and the use of complex laboratory equipment not possessed by more than twenty-five practitioners in the state; that no physician could make such a test for the statutory fee of $3 or anywhere near that sum, on account of the time, technical knowledge, and equipment required; and that to require a physician to make the test for that fee would be an unreasonable requirement. All this was substantially conceded by the state in the present case, and the concession seems to have been advisedly made. If the law in fact requires the Wassermann test to be made in case of every applicant for a marriage license, the argument is very strong that it requires the absolutely unreasonable. But does it require that test? The very facts relied on by the petitioner tending to show the technical, delicate, and expensive character of the test and that the great body of the practitioners of the state cannot make it, raises a more or less robust doubt as to the legislative intent to require the use of that test. The more difficult and expensive that test is shown to be, the more serious becomes the doubt. Now it must of course be assumed that the legislature had general knowledge of the delicacy, difficulty, and expensiveness of the Wassermann test, as well as of the fact that very few of the general practitioners of the state could make it. The bill was very thoroughly debated in both houses, met strenuous opposition, was the subject of numerous amendments, upon some of which disagreements arose between the houses which were only settled by committees of conference, and it seems quite certain that the provisions of the bill must have been well understood. It must be assumed also that the legislature had a

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definite and certain end in view, that they did not intend to place a prohibition on marriage, but intended rather to safeguard it by the use of practicable and reasonable means.

With these presumptions in mind it seems very hard to reach the conclusion that they intended that the Wassermann test should be a prerequisite to the granting of every certificate, for this would mean a practical embargo on marriage. Nor do we think that the language of the act necessarily forces us to this conclusion. The act requires physical examination and "the application of the recognized clinical and laboratory tests of scientific search."

As to the meaning of the terms "clinical and laboratory tests," we adopt the definitions given by one of the physicians who testified for the petitioner. He says:

"The term 'clinical' is a term which is dependent upon the meaning of the word 'clinic.' *Clinos* or *clinum* in Latin means a bed, and the clinical tests of any disease are those that may be observed by the bedside or when the patient is in the office. Scientific and laboratory tests are tests of anything that may come under the purview or the examination of a scientific man which call for proofs by means of instruments, apparatus, or chemical reactions, which are incapable of imagination or sentiment. All the things that can be discovered at the bedside or upon the general examination of a patient when none of the tests that are dependent upon the use of instruments, apparatus or chemical examinations that are incapable of being influenced by imagination or sentiment are one thing and deal entirely with the imagination or opinion of the examiner. Those that are laboratory tests are such as bring out absolute and unquestionable proofs which are incapable of being influenced by sentiment or imagination."

It seems also that a clinical examination takes into consideration such parts of the history of the case as are credible and not probably lies on the part of the patient, and covers as well the objective symptoms which, as said by one of the physicians, are protean thousands in form. The term "physical examination" explains itself. It includes, of course, a

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careful examination of the whole body, especially the sexual organs and the joints. As to the laboratory tests, it appears from the evidence of the physicians that in the case of gonorrhea there is a test called the Gram stain which is universally used and considered practically conclusive, certainly so when the objective symptoms are present. In the case of chancre or the primary stage of syphilis there is an examination of the discharges from the primary sore for treponema pallida with the Dorfield illuminator and the several so-called stains. In the secondary and tertiary stages of syphilis there is the Wassermann test and another called the Luetin test, sometimes called the Noguchi test, which is applied to the skin of patients suspected of syphilis. One physician calls these the only common tests, although another is named as experimentally used to some extent, called the Lange gold chloride test.

It is not claimed in this case that the Luetin test is included within the statutory command, although it seems to be a recognized test. Strict logic would seem to require the administration of the Luetin test if it requires the Wassermann test.

On this question as to whether the words "recognized laboratory tests" include all the tests which are in common use, some help may perhaps be obtained from the legislative history of the bill. As introduced the bill provided for the appointment by the board of health of special examiners not exceeding ten in each county (except Milwaukee, where the maximum was fixed at twenty-five). These examiners were to be licensed physicians of good moral character and scientific attainments, at least thirty years of age. Evidently it was contemplated that the examiners, as compared with the great body of the profession, should be experts, and, as the bill at that time provided for an examination covering inherited syphilis as well as acquired, it may be admitted as probable that it was in contemplation of its authors that all the known tests should be applied. The legislature, how-

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ever, made two radical changes in the bill, both of which seem very significant on this question: first, they took out of its purview inherited syphilis, thus removing a very large field of cases in which the Wassermann test is specially valuable, if not practically indispensable, and removed the feature requiring the appointment of examiners. By this last change the legislature empowered every licensed physician over thirty years of age in the state to make the examination when called upon to do so by a male applicant for marriage. We say this because we must regard every licensed physician as presumptively a person of good moral character and scientific attainments. The board of medical examiners has no authority to license those who do not possess these qualities. Secs. 1435*b*, 1436*e*, Stats.

Now the legislature did not say "*all* of the recognized tests," but simply "the recognized tests." Of course these latter words frequently and perhaps logically mean all, but do they as used in this law? Here is a case where the legislature must be presumed to know that only an occasional medical practitioner can make the Wassermann test, and yet provides for the application of the recognized tests by every practitioner over thirty years of age. When we consider this fact in connection with the other fact that there are recognized laboratory tests, to wit, the stains which can be made by all physicians with a well equipped laboratory, it seems quite impossible to believe that the Wassermann test was considered a *sine qua non*.

As has been before said, if the act is capable of two constructions, one of which will condemn it and the other save it from condemnation, we must give it the latter construction. Now we have in this case the following circumstances which are entitled to be considered in arriving at the intention of the legislature in using the words "recognized tests:"

First, inherited syphilis is not within the purview of the law; *second*, all gonorrhea can be absolutely detected by the

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physical examination and by the laboratory microscopical or Gram stain test, which can be applied by any physician with a well equipped laboratory; *third,* chancre or syphilis in its primary stage is easily discernible by physical examination; *fourth,* syphilis in its secondary stages is very easy of diagnosis by reason of the physical symptoms, the enlargement of glands, eruptions on the skin, and other changes; *fifth,* syphilis, after the secondary stage has passed, has either accomplished the ruin of the health, so that there is little or no possibility of marriage, or else has been so far cured as to be practically nontransmissible; *sixth,* the great majority of the cases of venereal disease (estimated by one physician at eighty per cent.) are cases of gonorrhea, leaving but twenty per cent. for cases of syphilis; *seventh,* the cases where the Wassermann test is really necessary for the detection of the disease are practically either cases of inherited syphilis or cases in which the disease has been so far controlled that physical manifestations are wanting and there is very small danger of transmission. The Wassermann test can be made absolutely of no avail by the patient himself, either by the so-called salvarsan treatment, or by the use of whisky for twenty-four hours before the blood is taken from the person.

In view of all these facts and in view of the fact that the legislature wished to reach practical and possible results, it seems unreasonable to suppose that they intended to prescribe tests which the great majority of the official examiners were not able to make. We prefer to construe the words "recognized tests" as intended to refer to the tests recognized and used by the people who were to make them. This construction sustains the law, makes it reasonable, accomplishes its evident purpose, and provides for a guard to marriage fully as effective in the vast majority of cases as the application of the Wassermann test.

We have not been able to appreciate the force of the contention that the law interferes in any respect with religious

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liberty. We know of no church which desires its ministers to profane the marriage tie by uniting a man afflicted with a loathsome disease to an innocent woman.

In case of refusal of the certificate the law does not provide for a jury trial of the question, but only for a trial before the county judge, and it has been suggested rather than argued that this is a denial of due process of law. We find nothing in the objection. If it be, as we hold, within the police power to prohibit a marriage until the fact of the absence of venereal diseases in the male is ascertained, the power to determine that fact must be vested in some competent body or person, and the exercise of the police power does not wait upon the slow processes of jury trials. It might be argued with much force that a law which should attempt to make the right to marry absolutely and solely dependent on the determination of a single individual, even though a physician and an expert, would be unreasonable. In view of that possibility doubtless the provisions of sub. 4 were inserted in the present law, and we perceive no good reason for holding that they do not afford sufficient protection to the applicant. If the state can refuse to permit the diseased to marry, it must, of course, provide a means of ascertaining the fact, and if it provide a means which can reasonably be expected under all ordinary circumstances to ascertain the fact in accordance with truth, that must be sufficient. In our judgment the law before us provides such a means.

It is said that the fee provided by the law is entirely insufficient, even if the Wassermann test be not required. Upon this question there is a difference of opinion among the physicians. We incline to the opinion that the fee is a very meager one. We should not, however, feel justified in holding the law unconstitutional on this ground. The penalties provided by sub. 6 of the law are said to be extreme. This may be so. We do not feel required to pass on that question in this case. In any event, we cannot suppose that

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these penalties are an indivisible portion of the law, or form in any sense a compensation for the other clauses.

By the Court.—Judgment reversed, and action remanded with directions to quash the alternative writ.

MARSHALL, J. (*dissenting*). I cannot agree to the decision of this case because:

1. To marry is a natural right. It is thus guaranteed by the purpose and spirit of the constitution: "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Sec. 1, art. I, Const. of Wis.

2. Legislative authority, called the police power, to regulate natural rights is necessarily limited to safeguarding those rights. That which conserves is, therefore, constitutional, while that which is so unduly oppressive as to materially impair is unconstitutional. So it is held that those regulations which are promotive of rights are reasonable and constitutional while those which are not appropriate in kind to conserve, or are so severe as to be unduly oppressive, are unreasonable and unconstitutional.

3. The marriage right is a proper subject for legislative regulation; but not for legislative destruction or material impairment. Whether the means of regulation are legitimate and whether the degree of restraint is unduly oppressive, are judicial questions.

4. The law in question requires, as a condition of competency to marry, that the male shall be free from any type of specified human infirmities, the proof to be made by scientific tests, which the evidence shows but few are sufficiently expert and have the instrumentalities to apply, and which cannot be applied for the fee named in the law, or without such expense as to operate as a serious restraint upon mar-

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riage, and the result of which would be liable, in many cases, to take away the right, though there were no acquired infirmity of the particular kind and none of transmissible character,—an entire absence of danger as to the wife and none as to descendants,—except within mere possibility,—so remote as to be infinitesimal,—or less than danger from any one of several infirmities which lawmakers would not venture to set up as a prevention of marriage.

5. It is legitimate to condemn a separable part of an enactment and sustain the rest, where there is reasonable certainty that the legislature would have enacted the latter had it appreciated the invalidity of the former, and where such latter, by itself, forms a complete workable enactment; and, where there is ambiguity in an act and, yet, it will admit of a reasonable construction which will sustain it, and there are no persuasive circumstances to indicate legislative intention not to include the legitimate idea, that is to be regarded as the proper one; but the court cannot properly ascribe a meaning to an enactment which cannot reasonably be read out of it, nor one which plainly violates the legislative purpose. To do the latter would be to make law instead of declaring the law as made by the lawgivers.

6. According to all evidence in this case the enactment in question means one thing and cannot reasonably be said to mean anything else, and all concede that, given such meaning, it is, unquestionably, a destructive interference with the marriage right. There is no legitimate way, in my judgment, of judicially recasting the legislative work in that respect. Rules for construction are not adequate for the situation. If there were less of, in effect, judicially making written law over by weeding out inconsistencies and twisting words out of their natural or obviously designed orbit so as to make them operate sensibly and conservatively instead of destructively, there would be less efforts to make people conform to artificial standards set up by well meaning theorists,

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regardless of personal liberty and the very spirit and purpose of our system.

7. The penal features of a police regulation, designed to prevent and punish its violation, are such an essential portion thereof as to be inseparable therefrom. Without them the law would be a collection of words without vitality, which a legislature would not, consciously, indulge in. Therefore, where such element is so harsh as to violate the prohibition of cruel or unusual punishments, or so tends to terrorize as to prevent freedom of appeal to the courts for redress or prevention of supposed wrongs, the whole enactment partakes of the unconstitutional character of such element and is void. *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885.

8. The penal clause here seems to be in the class with those found to be fatally unusual and unduly oppressive in the cases above cited. It is conceded, as I understand it, that it is impracticable to satisfy the certificate prescribed by the law,—in any event the evidence seems all one way on the subject, and that something less severe as to the examination must be found to be satisfactory, yet, if a county clerk issues a license, except upon the particularly worded certificate, he will be guilty of a felony and liable to confinement in the state prison for the term of five years. So if an intended bridegroom finds himself unable to carry out his promise, or an intended bride finds herself stranded, so to speak, on the shoals of this drastic regulation,—though there be no real danger in the contemplated union being consummated,—or if the parents of either or any one having knowledge of the facts, though acting from the purest motives and in explanation of the unfortunate dilemma, discloses the reason why the mutual promises cannot be carried out, such person will be liable to punishment by confinement in the state prison for five years. The mere statement of the matter seems enough to condemn the act utterly

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9. There is no reasonable necessity for such a law, as the evidence amply shows. It is competent for any prospective wife to protect herself, or, in most cases, her parents to do it in her behalf, as fully as the legislation was designed to do and accomplish it by treaty. There is perfect freedom of self-protection by demanding evidence of purity as a condition of marriage. Why should the public step in because of a case of danger now and then, and impose on the great mass of men the burdens of such a law? That it is an interference with a right which goes so far beyond fair conservation as to materially impair, seems plain.

10. Recapitulating: The act unduly casts suspicion of immorality and criminality of most serious nature upon every male candidate, present, prospective, or possible, for the marriage state. It imposes such an oppressive burden upon all such candidates as to proving competency to enjoy the natural right of marriage, or so takes such right away without justification in many cases and restrains its exercise generally, as to efficiently discourage an institution which is absolutely essential to public welfare and so recognized and protected by the fundamental law. By so oppressively interfering with the constitutional right of marriage as to partially or wholly destroy that right, the tendency will inevitably be to promote immorality and social and racial retrogression. The penal feature is so severe as to destroy freedom of appeal to the law of the land for redress. To so read the law as to take from it any of these infirmities is to go outside the judicial field and make a law.

For the reasons stated, I think it is the duty of the court to condemn the act in question as subvertive of constitutional liberty and right. That the motives of those whose activities resulted in imposing such enactment upon the people of this state were of the purest, I do not question; but if all the well-meant suggestions of volunteer social reformers were vitalized by written law, we might have a system worse than

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anything yet ventured upon, even under the paternalism of nations unfettered by constitutional safeguards, and all our rights would be turned into mere uncertain privileges and practically destroyed. To prevent despotism of that kind is one of the most important functions of constitutional guaranties coupled with an independent judicial agency to enforce them. I think here is a case where enforcement is required. I think to thus meet the situation, would consist with the requirements of judicial duty and result in greater care in giving legislative sanction to well-meant suggestions thrust upon attention and appreciation that, "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

The court's opinion constrains me to add this:

The history of a legislative enactment may be looked to in aid of judicially clearing up its obscurities, but not to justify putting words into or taking words out of it not therein or thereout by reasonable implication; and, in the end, no meaning can properly be ascribed thereto, not fairly found expressed by the words thereof, taken in their reasonable scope,—which violates the rules of language or of law,—even though there be evidence *aliunde* the writing that such was the legislative purpose. To overstep this is to make rather than to declare and apply law, forgetting "that the judicial office is *jus dicere, et non jus dare.*"

An act of the legislature regulating civil conduct establishes public policy within the scope of legislative power; but when the enactment contravenes the higher public policy, enshrined in the fundamental law, the latter prevails and the former is not law at all.

The statement "that the police power does not wait upon the slow processes of jury trial" is rather too broad and in my opinion is subject to many important exceptions accord-

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ing to the situations dealt with. Where the subject is a principal constitutional right, like that of marriage, and opportunity for jury interference is so essential for its due conservation, to take away or materially impair it without such opportunity,—there being no imperative necessity therefor,—would be destructively harsh and not due process of law in a constitutional sense, and inconsistent with the spirit of the fundamental law. If there is any imperative necessity why the right of marriage should be liable to confiscation as under the law in question, without opportunity for the protection against injustice afforded by opportunity for some semblance of a common-law hearing, none has been suggested.

I think I as fully appreciate as any one the importance of social purity and protection of the newly elected mothers of the races to come from contamination and suffering; but there is reason in all things and there is a realm beyond and between the two stands the constitution. Removal of all responsibility for self-care would eventually result in a weak and degenerate race. Undue regulations of ordinary affairs and rights tend to produce the very condition they are aimed to prevent, or something worse, and are self-destructive where not unconstitutional.

I have aimed to state my views of the legislation in question in its constitutional aspect with a minimum of discussion of the enactment in detail, preferring to formulate, concisely, elementary principles, associated with a few observations appropriate to the situation and trust the reader to apply them to the act and the court's opinion as they will be found in the report of this case. If those principles, briefly illustrated, without the aid of judicial decisions, do not efficiently indict and condemn the enactment they will show much clearer the grounds for my opinion than lengthy discussion would and will be more likely to be helpful in respect to future legislative efforts.

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VINJE, J. I concur in the foregoing dissenting opinion of Mr. Justice MARSHALL.

TIMLIN, J. (*concurring*). The statute in question, ch. 738, Laws of 1913, requires that, upon application for a marriage license, the male party to such marriage must, within fifteen days prior to the application, be examined by a physician of designated qualifications with reference to the existence or nonexistence of any venereal disease in such male person. The licensing officer is prohibited from issuing a license unless a certificate of such a physician is presented setting forth that this male person is free from acquired venereal disease so far as can be determined by the recognized clinical and laboratory tests of scientific search. Physicians were called as witnesses in the court below and some of them testified, in substance, that the recognized laboratory tests of scientific search include what is known as the Wassermann test for syphilis. This test requires a special laboratory equipment, and out of 3,000 physicians in this state not more than twenty-five, and out of 300 physicians in Milwaukee county not more than six, are equipped or prepared to apply the Wassermann test. That the fee of $3 fixed by statute is unreasonably small for making the Wassermann test, for which the reasonable charge would be about $25. The Wassermann test is described in volume 20, present edition of The Americana, subject "Syphilis," and the description need not be repeated. It is said to have been in use about seven years, and in the encyclopedia mentioned is somewhat discredited already, and the testimony in this case corroborates such discredit. For it was quite unanimously agreed upon that repeated experiments covering quite a long period of time were necessary, that a negative result did not prove the subject free from syphilis, while a positive result meant that the subject had measles or scarlet fever or tuberculosis or

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typhoid fever or diphtheria or diabetes or syphilis. Also that this test may be frustrated and a negative result obtained by a syphilitic if, preparatory to the test, he load up with alcoholic liquor, salvarsan, or some form of mercurial medication. In the primary and secondary stages of syphilis the diagnosis may be made by inspection of the affected parts; in the third or tertiary stage this cannot be done, usually, and it is in this latter stage that the Wassermann test fails most frequently. There are other laboratory tests besides the Wassermann test. These other tests, or some of them, consist of a microscopic examination and pigmentation for the purpose of identifying the bacteria found in the discharge from the affected parts. It seems to me that such testimony goes a long way toward proving that the use of this Wassermann test was not within the contemplation of the lawmakers. The statute indicates that they had in mind laboratory tests which would be completed within fifteen days and which would be ordinarily compensated by a fee of $3 and which were understood and practiced by ordinary physicians of good character and standing throughout the state. The rule that statutes should be interpreted with reference to the popular and ordinary understanding of the language employed is a very constant and common-sense rule of law. The legislators probably never heard of the Wassermann test. But they may be presumed to have had the capacity of intelligent persons, the same sort of information, and the same knowledge on this subject. From this viewpoint we can say that they believed the three principal venereal diseases were gonorrhea, syphilis, and chancroid; that these diseases were each of bacterial origin; that the micro-organism of each was distinct and capable of identification by microscopic examination and staining; and that these last simple laboratory investigations were the laboratory tests referred to in the statute.

I do not concede that, weighted down with the Wasser-

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mann test, the law would be unconstitutional if it were valid without this handicap, but I do think that it cannot be held upon any fair interpretation of the statute that the legislature intended that the laboratory test required was one which but few physicians could apply, which required such a long time and was so uncertain in its results, and which could not be performed for the fee fixed by the statute. There could not, I think, be much doubt of this were it not for the use of the words "scientific search." It seems to me, however, these words were employed to require something more than a mere physical inspection of the person. The words "recognized laboratory tests" mean, I think, those commonly recognized and those ordinarily practiced; those recognized by common usage, not necessarily including all those known to or recognized by the few intellectuals in advance of their day and of the body of their profession.

Taking in this wide sweep would include those laboratory tests which obtain recognition for a few months or a few years and then are abandoned and forever afterwards strangers to science. "Recognized" here and in this connection means "well known," "accepted," and "established." The law requires us to find the statute constitutional if by any reasonable interpretation it can be made to conform to the constitution, and not to search after something which would tend to make the statute invalid. Is the statute, thus interpreted, constitutional? The learned circuit judge thought that it conflicted with sec. 1, art. I, and sec. 18, art. I, of the state constitution. The first is a declaration that all men are born equal, free, and independent, and have certain inherent rights; among them life, liberty, and the pursuit of happiness. The second relates to freedom of worship and liberty of conscience. It is not contended that the state constitution elsewhere, by express interdict or by necessary implication, prohibits the legislation in question. The statute in question, although often alluded to as "The Eugenic Mar-

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riage Law," has little relation to that pseudo science called "Eugenics." It is primarily a law to prevent the spread of contagious diseases and regulative of the marriage contract, adding to the requirements of age, lack of relationship within the prohibited degree, license, etc., the further requisite of a certificate of freedom from venereal disease. This is also indicated by the limitation to "acquired" as contradistinguished from "inherited" venereal diseases, and it seems to me the statute calls for this construction. This is a subject well within the regulative power of the legislative branch of government, unless prohibited by the constitution. Freund, Police Power, § 124; *In re McLaughlin's Estate,* 4 Wash. 570, 30 Pac. 651; *Reynolds v. U. S.* 98 U. S. 145; *Gould v. Gould,* 78 Conn. 242, 61 Atl. 604, 2 L. R. A. N. S. 521; *Maynard v. Hill,* 125 U. S. 190, 8 Sup. Ct. 723; *Boehmer v. Kalk,* 155 Wis. 156, 144 N. W. 182.

I have much doubt whether the state or condition called "happiness" in the constitution, or the state, condition, or occupation there described as "the pursuit of happiness," is capable of judicial ascertainment or identification. This process would seem to be necessary before a court could determine whether a given statute impinges against or encroaches upon such state or condition. It is, however, quite unnecessary to determine this question here, for, assuming for argument's sake that the vague generalization quoted does guarantee to the citizen certain rights which the legislature may not by statute take away, still the exercise of all constitutional rights is subject to reasonable regulation in the public interest under the so-called police power of the state. Before the statute in question could be declared invalid on this hypothesis it must appear that the statute was not at all conducive to the preservation of public health, welfare, or morals, or that it carried regulation to an unreasonable or unnecessary extent and so as to interfere seriously with constitutional rights. It is said by those who have studied the

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subject that there are no reliable statistics to show the prevalence of venereal disease in civil life. The most contradictory and conflicting estimates may be found. Gonorrhea seems to be about four times as prevalent as syphilis; the latter and chancroid about equally prevalent. There are those who claim that syphilis is not inherited, but affects the offspring merely because the bacterial organisms causing the disease have their habitation in the genito-urinary organs and so reach the fœtus and inoculate it by contact, and there are authorities denying this. All, I think, agree that these three venereal diseases are contagious and communicable by contact with the mucous membrane. Gonorrhea is the more readily cured, but all are curable, at least in the early stages of the disease. In bulletins of the federal Bureau of the Census relative to marriage and divorce these diseases are not expressly noted as a cause of divorce, and if they are included under some general designation, still they do not seem to figure largely as a cause. A bulletin of the same bureau entitled "Mortality Statistics," enumerating 171 causes of 730,538 deaths in territory preponderatingly urban, ascribes only 2,999 to venereal diseases, and of this 1,582 were infants under one year and 1,735 children under five years of age. Bulletin No. 108 (1910).

In vol. 5, part 2, pp. 324 to 368, "Transactions of the Fifteenth International Congress of Hygiene and Demography," are several papers on this subject, in one of which (p. 338) Dr. Lung endeavors to show that venereal diseases are as prevalent in civil life as in the United States navy. If this is correct, they are very prevalent. Chapin on Municipal Sanitation in the United States contains the statement that these diseases are very prevalent, but the only definite figures given relate to 2,886 examinations in ten months of 230 prostitutes, which discovered only forty-two cases. In the army and navy, and in cases of applicants for enlistment as soldiers or sailors, superior opportunities for

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observing and recording cases of this nature exist, and concealment by the afflicted person is next to impossible. Here we find that the army and navy of the United States leads the world, having the highest percentage of these three venereal diseases, although the British army and navy is a little ahead of us, and of the rest of the armies of the world, in syphilis. Norris, Gonorrhea in Women (1913) pp. 137, 138.

This condition of our army and navy is thought by some to be largely due to the greater influence in this country of well-meaning and emotional, but illy-informed, persons, who reject the teachings of experience elsewhere and refuse to recognize the prostitute by compelling her to submit to inspection and regulation. It does not seem probable that this high percentage of venereal disease in the army and navy measures the prevalence of such diseases in civil life, but it shows that there is enough in the last mentioned walks of life to justify legislative action in prevention of its spread. It is also thought by the highest medical authorities that the main source of venereal infection is the prostitute, and that here regulation and prevention may be made most effective.

We are not authorized to set up our judgment on such matters against that of the legislature or do more than measure the statute against the constitution, and if we find therein no prohibition expressed or necessarily implied against such legislation the statute must be enforced.

For my part I have no sympathy with this statute. I think it tends to discourage marriage rather than to prevent the spread of venereal diseases. All experience goes to show that laws making marriage expensive or difficult or subject to objectionable requirements tend to increase illegitimate sexual intercourse. The latter tends to promiscuousness, hence to the spread of venereal diseases. The notion that wives are infected only by husbands who at the time of marriage have venereal diseases seems very simple. If a man

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knows that he has a venereal disease and notwithstanding this desires to be married, he will not submit himself to any honest examination for very obvious reasons. He will go out of the state to be married. If he has such disease and does not know it he must be quite unsophisticated. If there are cases where a man is so afflicted and does not know it, they must be so rare as to be quite negligible for the purpose of justifying such legislation. So I think the law will reach only those males desiring to marry who have no venereal diseases and therefore do not fear the examination, or those who have so little sense or so little disease as to be unaware of their affliction. In case a marriage engagement is announced a year or thereabouts before marriage and the prospective groom fails to pass the examination and must either break the engagement or resort to the scandalous or mortifying appeal to the county judge, neither the bride nor her parents are allowed to disclose any matter relating or pertaining to the examination of the applicant for a license to marry. This may be a great damage to the girl, give rise to unworthy suspicion and gossip, and the penalties imposed upon persons making such disclosure are, I think, exorbitant and unreasonable, as are those imposed on the county clerk who shall unlawfully issue a license. But I think this part of the act can be held invalid without affecting the validity of that portion of the act requiring an examination by and a certificate from a licensed physician to the effect that the male person intending to marry is free from all venereal diseases so nearly as can be determined. The form of the certificate itself is a sort of an insult, a Scotch verdict of "not proven;" and the statute in all its parts is, in my opinion, about as silly and obnoxious a piece of legislation as could be devised. But the ineffectiveness of the law, or its folly if it be foolish, or the fact that it was passed in a modern spirit of legislating first and investigating afterwards, is quite remote from the question of its constitutionality. The people

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must learn to hold their legislators responsible for the enactment of laws which, however unwise and absurd, are still within the constitutional power of the legislature. It will be for the benefit of both the people and the legislature to recognize this responsibility and to know that they cannot look to the supreme court for relief in every case of an objectionable but constitutional law. So long as the legislature believes there was enough venereal disease in this state to justify the enactment of the statute in question, we cannot gainsay it, for that was a matter for the legislature to decide. Assuming the prevalence of venereal disease, its contagious nature, and its communicability by contact, it was within the power of the legislature to enact statutes wholly or partially preventative of the spread of these diseases. If the legislature libeled the people of this state by making it to appear that venereal diseases were prevalent here when in fact they were not, the members of that body must for such error answer to the electors and not to the supreme court. If I concede, as I must, the power to require a marriage license, I must also concede the power to require of the licensee reasonable qualifications, and it cannot be said to be unreasonable that he be free from venereal disease.

I cannot imagine how this law can be said to interfere with freedom of worship or liberty of conscience. The notion that marriage was a sacrament, not a civil contract creating a status, once vigorously asserted, has long since passed away. A point is made that requiring the prospective husband to submit to the examination without making the prospective wife do so conflicts with the Fourteenth amendment to the United States constitution, which forbids the states to deny the equal protection of the laws. But the men desiring to marry form a very definite class quite germane to the object sought to be accomplished by the statute. And we read in the learned medical treatises that while the primary source of venereal infection is usually the prostitute, still such dis-

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cases are generally brought into the family by the husband rather than by the wife. The legislature was justified in so deciding.

It is probable that in an action by a doctor under thirty years of age but otherwise qualified, or by an applicant for a license who held a certificate from such physician as is last described, that portion of the statute in question which requires the applicant for a marriage license to present to the licensing officer the certificate of a physician "at least thirty years of age" would be held invalid under the rule of *Smith v. Texas,* 233 U. S. 630, 34 Sup. Ct. 681. But the relator is in no position to raise this question, and the last mentioned part of the act is clearly severable from the remainder and cannot be said to be either an inducement to the enactment in question or an essential part thereof without which the legislature would in all probability not have enacted the remainder of the statute. I find no ground for holding that part of the statute here involved unconstitutional.

BARNES, J. (*concurring*). I concur in the result, but do not agree with all that is said in the opinion.

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APPEALABLE ORDERS. See APPEAL, 1–5.

ARBITRATION AND AWARD.

1. A lease of water for power at a rental of $6 per horse power per annum provided for a renewal for a second term of ten years at a rental to be fixed by arbitration. At the end of the original term no arbitrators were appointed, but the lessee continued for about three years to use the water and pay rent at the old rate, the lessor giving receipts in full for part of the time, and afterward receipts "on account." Arbitrators were then by agreement appointed "to determine the annual rental which [the lessee] ought in justice to, and shall, pay to the [lessor] for said premises and power, during said renewal period," specifying the entire ten-year term; and in making the next payment, prior to the award, the lessee stated that it was made subject to the terms of the arbitration agreement and that if the decision should establish a lower rental the lessor would be charged with the excess paid during the period covered by said agreement. *Held,* that these facts sustained a finding of the court that there was no accord and satisfaction as to the rent accruing prior to the arbitration agreement. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co.* 412

2. In making their own independent investigation in this case the arbitrators were not guilty of misbehavior, but did only what the parties consented they might do. *Ibid.*

ASSAULT AND BATTERY.

Justification. See DAMAGES, 5, 7. SHERIFFS, 2.

1. In an action for assault and battery by a watchman upon a trespasser upon defendant's property, it being claimed by defendant that the watchman acted at first in protection of defendant's property and later in self-defense, and that he did not use unnecessary force in either instance, it was error, after rejecting questions proposed by defendant relating to both branches of the justification, to submit in the special verdict only the question whether the watchman "aggressively and otherwise than in self-defense" used "force upon plaintiff." *Zimmerman v. Northern Pac. R. Co.* 514

2. Testimony offered by defendant in such case tending to show that the watchman did not use excessive force, that his hand was wounded by a knife carried by plaintiff, that plaintiff had several times taken wood and coal from defendant's yards, and that he had been at one time arrested by another watchman for stealing wood, was erroneously excluded. *Ibid.*

ASSESSMENTS. See MUNICIPAL CORPORATIONS, 1–3, 9, 13–21. TAXATION.

ASSIGNMENT OF ERRORS. See TRIAL, 3, 4.

ASSUMPTION OF RISK. See RAILROADS, 7.

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ATTORNEY AND CLIENT.

Contracts, express and implied.

1. In an action for the value of services rendered, it is *held* that under the evidence the trial court properly charged the jury and submitted the case upon the theory that plaintiff claimed under an express contract of employment as well as upon the theory that an implied contract was claimed; and that the frequent use of the terms "contract of service" and "employment" in the charge was not misleading. *Brennan v. Healy,* 37

Negligence: Liability: Good faith.

2. Where, by reason of his failure to act with reasonable knowledge and skill in the transaction of his client's business, an attorney failed to collect a judgment in favor of such client out of funds belonging to the judgment debtor which came into the attorney's hands, the fact that he acted in good faith and in the honest belief that he was acting for his client's best interests will not defeat a recovery of damages by the client. *Miller v. Prescott,* 264

ATTORNEY'S FEES. See EXECUTORS AND ADMINISTRATORS, 4.

AUTOMOBILES.

Injury to pedestrians: Contributory negligence. See NEGLIGENCE, 5, 7. STREET RAILWAYS, 4.

1. In an action for injuries to a person who, while standing in the street waiting for a street car, was struck by an automobile, it appeared that the automobile was running very slowly, that plaintiff was plainly seen by the chauffeur, and that there was plenty of room to pass him; but the evidence being conflicting as to whether plaintiff stood still or, just as the automobile was about to pass him, stepped backward in front of it, the question of the chauffeur's negligence is *held* to have been one for the jury. *Ouellette v. Superior M. & M. Works,* 531

2. Upon plaintiff's testimony in such case that he did not hear the automobile horn, that he had been standing where he was but a very few seconds, that he did not move before being struck, that one car which he wished to take had run by him, and that he was intent on signaling another so as not to be delayed, the question of his contributory negligence is *held* to have been for the jury. *Ibid.*

Same: Negligence of chauffeur: Who liable.

3. Where the owner of an automobile stored it at a garage under an agreement by which the garage keeper, for an agreed compensation, was to furnish a chauffeur from time to time as requested to drive the car (it being left to the garage keeper to select the driver and pay him his compensation and to hire and discharge him at pleasure), the relation of master and servant existed between the garage keeper and the driver, and the garage keeper was liable for negligence of the driver while operating the car at a time when the owner was an occupant thereof, if such owner did not assume to direct or control the method or manner of driving, further than to tell the driver where he desired to go. *Ouellette v. Superior M. & M. Works,* 531

Insurance. See INSURANCE, 1.

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BANKS AND BANKING.

Payment of deposit to third person: Negligence: Validity of receipt: Burden of proof.

1. In an action against a bank to recover the amount of a savings deposit which defendant had paid to a grandson of the depositors upon a receipt signed by one of them, but which signature had been obtained by fraud, it is *held* that the question of defendant's negligence in paying the savings deposit under the circumstances, as well as the question of the said plaintiff's negligence in signing the receipt, were for the jury. *Heineman v. Old Nat. Bank,* 289
2. In such case the burden of proving by clear and satisfactory evidence the fraud by which the signature was obtained was upon the plaintiffs. *Ibid.*

BENEFITS. See MUNICIPAL CORPORATIONS, 1, 2, 13, 14, 16.

BILLS AND NOTES.

Sale of draft to a bank: Evidence.

Evidence that a sight draft was indorsed by the drawer for deposit to his credit in a bank which had previously obtained a guaranty of the payment of the draft and which credited the drawer with the amount thereof as cash, together with other direct testimony, is *held* to support a finding by the trial court to the effect that there was a completed sale and transfer of the draft to the bank, notwithstanding the fact that the bank, after being notified of its nonpayment, attempted to charge the draft back to the drawer. *Thomas v. Citizens Nat. Bank,* 635

Certificates of deposit. See GIFTS.

BIRTH. See EVIDENCE, 5.

BOARD OF REVIEW. See TAXATION.

BONA FIDE PURCHASER. See EVIDENCE, 4. FRAUD, 1-4.

BONDS. See MECHANICS' LIENS.

BOXING CONTESTS. See PRIZE FIGHTING.

BREACH OF PROMISE OF MARRIAGE.

1. In an action for breach of promise of marriage the admission of evidence that defendant's father was president of a steel foundry company was not prejudicial error as inducing a verdict for larger damages than the jury would otherwise have given. *Luther v. Shaw,* 231
2. In such an action seduction under promise of marriage and also an attempt made at the trial, not in good faith or with any reasonable hope or expectation of establishing such fact, to show that plaintiff was a lewd woman or of immoral character, might properly be considered in aggravation of damages. *Ibid.*
3. Exemplary damages may be allowed in such an action where there are circumstances of aggravation. *Ibid.*
4. In an action for breach of promise of marriage, where seduction was shown and an attempt was made at the trial to besmirch plaintiff's character, an award of $3,000 compensatory damages and $500 punitory damages is *held* not to indicate perversity,

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passion, or prejudice on the part of the jury; and after reduction of the compensatory damages to $1,500 by the trial court the amount allowed is not excessive, although defendant was an artisan without property. *Ibid.*

BROKERS.

Commissions: Procuring cause of sale: Prior negotiations between principals. See CONTRACTS, 14–24.

1. A broker employed to find a purchaser for real estate may be the procuring cause of a sale and entitled to a commission thereon, if he initiates the negotiation which results in such sale, notwithstanding the principals in the transaction had previously negotiated with each other in respect to the purchase and sale of the same property, provided such prior negotiations had been abandoned before his intervention. *Meldrum v. Southwick-Sellers L. Co.* 367
2. The abandonment of negotiations is one thing, abandonment of the purpose to buy or sell another. *Ibid.*
3. If the owner abandons direct negotiations with a possible purchaser for the purpose of beginning anew through another channel and thereby obtaining a better price, the broker of whose services he knowingly avails himself in carrying out that purpose is entitled to compensation. *Ibid.*
4. The evidence in this case is *held* to sustain findings by the jury that prior negotiations with the purchaser had been broken off and that the plaintiff was the procuring cause of a sale. *Ibid.*

BURDEN OF PROOF. See BANKS AND BANKING, 2. EVIDENCE, 2. HUSBAND AND WIFE, 2, 9. INSTRUCTIONS TO JURY, 2.

CARRIERS. See LANDLORD AND TENANT, 1.

CASUALTY INSURANCE. See INSURANCE, 1.

CERTIFICATES OF DEPOSIT. See GIFTS.

CERTIFICATES OF NECESSITY AND CONVENIENCE. See PUBLIC UTILITIES, 5, 11–13.

CERTIORARI. See TAXATION, 2, 3.

CHANGE OF GRADE. See MUNICIPAL CORPORATIONS, 35–42.

CIRCUIT COURTS. See APPEAL, 2–4. COURTS, 6. VENUE.

CITIES. See MUNICIPAL CORPORATIONS. PUBLIC UTILITIES, 8–13.

CLAIMS. See EXECUTORS AND ADMINISTRATORS, 2. MUNICIPAL CORPORATIONS, 43.

CLASSIFICATION. See CONSTITUTIONAL LAW, 14, 16. MARRIAGE, 2.

CLEAN HANDS. See EQUITY, 6, 7.

COMMERCE.

Interstate commerce. See RAILROADS, 6.

A contract to furnish a manufacturer in this state with pulp wood coming from Wisconsin, Minnesota, Michigan, and the Dominion of Canada involves interstate commerce, and the question whether it is illegal because of being in restraint of trade is to be determined by the federal rather than the state statute. *Pulp Wood Co. v. Green Bay P. & F. Co.* 604

COMMERCIAL PAPER. See BILLS AND NOTES. GIFTS. PARTIES, 1.

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COMMISSIONS. See BROKERS.

COMPARATIVE NEGLIGENCE. See RAILROADS, 10.

COMPENSATION. See CONSTITUTIONAL LAW, 16. EXECUTORS AND ADMINISTRATORS, 3. OFFICERS, 8, 9.

COMPLAINT. See CONTRACTS, 11. LIBEL AND SLANDER, 2. NUISANCES, 2. PARTIES, 2. PLEADING, 1–3, 5, 7–10.

COMPROMISE. See MUNICIPAL CORPORATIONS, 5.

CONDEMNATION OF LAND. See MUNICIPAL CORPORATIONS, 1, 2, 37–42.

CONDITIONS SUBSEQUENT. See DEEDS, 2. EASEMENTS, 2, 3, 5.

CONSPIRACY. See CONTRACTS, 6–13.

CONSTITUTIONAL LAW.

Legislative powers: Construction of statutes. See HEALTH. MARRIAGE.

1. A constitutional law enacted by the legislature establishes public policy on the subjects covered by it, and that policy is not open to question by the courts. *Peterson v. Widule,* 641
2. The courts must sustain a law unless its unconstitutionality is beyond reasonable doubt. *Ibid.*
3. If a law is open to two constructions, one of which will condemn it and the other save it from condemnation and accomplish the legislative purpose, it must be given the latter construction. *Ibid.*

Police power. See HEALTH. MARRIAGE.

Same: Weights and measures: Municipal ordinance: Reasonableness: Penalties.

4. Weights and measures may be reasonably regulated under the police power. *Brittingham & Hixon L. Co. v. Sparta,* 345
5. Sec. 1666*b*, Stats. (ch. 566, Laws of 1911), which requires coal to be sold by weight and that the seller give to the purchaser with each delivery a ticket showing the gross weight of the load, the tare, and the net weight of the coal, or, when the buyer carries away his purchase, a ticket showing the actual number of pounds delivered, and to deliver duplicate tickets to the sealer of weights and measures on demand, does not purport to be a complete scheme for the regulation of weights, and under sec. 925—52, sub. (45), Stats., a city operating under the general charter law may still adopt reasonable regulations for the weighing and sale of coal not in conflict with any statute of the state. *Ibid.*
6. An ordinance requiring that all coal offered for sale and delivered within the city limits, except in carload lots, shall be first weighed upon the city scales by the city weighmaster, who shall give the owner a signed ticket showing the quantity of coal in the load upon the return of the wagon unloaded and weighed, does not require the coal to be sold on the weight as shown by the city scales and so does not conflict with the statute which contemplates that coal may be weighed on any tested scales and sold on such weight. *Ibid.*
7. An ordinance should not be declared void in its entirety because some of its provisions are deemed unreasonable, unless

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the court can say that the valid and void parts cannot be separated and that the former would not have been enacted except in conjunction with the others. *Ibid.*

8. It is essential, however, to the sustaining of an ordinance in part that the portion upheld form, independently of the invalid portion, a complete law in some reasonable aspect, so that it may be fairly concluded that the council would have enacted it without the invalid parts. *Ibid.*

9. An ordinance which has a reasonable tendency to provide a check upon the weighing of coal by the dealers is not void because incomplete and inadequate to fully accomplish that purpose, as by failing to provide means by which a purchaser can readily identify the load delivered to him from the records of the city weighmaster. *Ibid.*

10. The fact that the expense of complying with the terms of an ordinance regulating the weighing and sale of coal will be large cannot affect its validity, since, if no more than a reasonable profit is being realized by the dealer, the expense must fall on the consumer. *Ibid.*

11. If such an ordinance be unreasonable and therefore void as to sales made for consumption outside the city, where delivery is made at the dealer's yard in the city, it may still be held good as to other sales where the dealer hauls the coal from its yard and delivers it on the premises of the consumer within the city. *Ibid.*

12. The fact that a city requires all coal to be weighed on its scales presupposes that it will furnish the scales and keep them in order and keep a man in charge of them at all times, excluding Sundays and legal holidays, when coal is customarily delivered, and if it fails to provide the means of weighing it cannot punish dealers for its delinquency. *Ibid.*

13. So, if in exceptional cases deliveries must be made outside of the usual working hours in order to provide fuel for those in immediate need of it, the city must provide the means of weighing if it would exact penalties for failure to weigh. *Ibid.*

14. A city has the right to place coal dealers in a class by themselves and legislate for the class, and so long as the legislation is reasonable there is no denial of the equal protection of the laws. *Ibid.*

15. The exaction of a fee of ten cents a load for weighing is not so large as to indicate a purpose to tax the industry, or any purpose except to provide a fund sufficient to defray the expense of executing the law, and does not invalidate the ordinance. *Ibid.*

Obligation of contracts. See PUBLIC UTILITIES, 6.

Classification. See CONSTITUTIONAL LAW, 4. MARRIAGE, 2.

Same: Cities.

16. Ch. 376, Laws of 1897, fixing the salary of the city clerk in all cities having a population of 150,000 or more, and authorizing him to employ experts to assist him in making the tax roll, is a general law and valid, although Milwaukee was and still is the only city of that size in the state. *Milwaukee v. Reiff*, 226

Equal protection of laws. See CONSTITUTIONAL LAW, 14.

Due process of law. See MARRIAGE, 8.

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CONTRACTS.

Requisites and validity. See ATTORNEY AND CLIENT, 1. BILLS AND NOTES. COMMERCE. HUSBAND AND WIFE, 1–5. INFANTS, 1, 2. MECHANICS' LIENS, 2–4. SPECIFIC PERFORMANCE.

Same: Execution: Fraud.

1. When the validity of a written instrument is in issue it is always competent, in an action at law as well as in a suit in equity, to show that the instrument was never executed; that its signature was procured either by fraud or duress, and therefore that it never had any legal existence as a valid instrument. *Heineman v. Old Nat. Bank,* 289

Same: Meeting of minds: Preliminary agreements: Incompleteness. See SPECIFIC PERFORMANCE.

2. Where a contract informal but complete in its terms appears to have been made, it will take effect although the parties contemplate that a more formal one will thereafter be made; but writings intended only as preliminary negotiations, to be followed by a formal contract containing material provisions not contained in or to be inferred from such preliminary writings, will not take effect as a contract. *Goldstine v. Tolman,* 141
3. Certain "preliminary agreements" for a ninety-nine year lease of a city lot are *held* to have been tentative only, there being no definite contract upon the terms of which the minds of the parties had fully met or of which specific performance could be enforced. *Ibid.*

Same: Legality of object and consideration: Construction: Unlawful combinations.

4. A contract which contravenes public law is void and no recovery can be had thereon. *Pulp Wood Co. v. Green Bay P. & F. Co.* 604
5. Where a contract is fairly open to two constructions, by one of which it would be lawful and by the other unlawful, the former must be adopted. *Ibid.*
6. The words "restraint of trade" as used in the federal anti-trust statute have the same meaning as at common law and in the law of this country at the time of its passage, and embrace only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade. *Ibid.*
7. Whether or not a particular contract contravenes the law depends on the extent to which competition has been restricted or trade has been obstructed, and this must be determined from the existing facts; when the facts are ascertained the question whether the restraint is reasonable or otherwise becomes one of law. *Ibid.*
8. There is nothing in itself unlawful in two or more persons appointing a common agent to purchase a commodity which they require and in giving such agent the exclusive right to do the buying. *Ibid.*
9. Such an arrangement becomes unlawful when it injuriously affects the public, that is, when it unduly restricts competition or restrains trade, and this must ordinarily be made to appear from facts outside of the contract. *Ibid.*

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10. The producer of a commodity is entitled to protection against combinations which unreasonably depress the price of such commodity, even though the general public might to some extent benefit by the depression. *Ibid.*

11. A contract which contemplated the supplying of pulp wood by plaintiff to twelve large paper manufacturers who used about twelve per cent. of the entire supply of pulp wood in the particular territory,—the season's requirements of each being estimated,—and which bound the defendant to buy pulp wood of no other person, is not, upon its face, unduly restrictive of trade, and hence not to be pronounced illegal upon demurrer to the complaint in an action brought thereon. *Ibid.*

12. The mere fact that a vendor corporation is an unlawful combination will not relieve the vendee from paying for goods purchased from it, provided the contract of purchase is not in itself unlawful. *Ibid.*

13. Sec. 1747*e*, Stats., is substantially a copy of the federal anti-trust statute, restricted in operation to this state and with a lesser penalty, and it should receive the same interpretation that has been placed upon the federal act by the supreme court of the United States. *Ibid.*

Construction and operation. See CONTRACTS, 5. DEEDS. HUSBAND AND WIFE, 3–5. MECHANICS' LIENS, 2–4. MORTGAGES.

Same: Exclusive agency for sale of lands: Option to purchase: Breach by principal: Damages recoverable.

14. A contract of exclusive agency for the sale of certain lands, with an option to purchase all or any of the lands at $6 per acre, contained stipulations to the effect that all sales made by the agents must be submitted to the principal to fix the price and terms of sale, that all moneys received on approved sales, above the stipulated commission, were to be turned over to the principal, but that, in case of the agents' electing to purchase the unsold lands, all sums in excess of $6 per acre received by the principal upon the lands sold were to be credited on the purchase price of the lands which the agents elected to purchase. The principal reserved the right to sell, but at not less than $10 per acre, in which case no commission was to be paid the agents, but all sums above $6 per acre received upon such sales were to be credited upon lands they might purchase. *Held*, that these provisions showed a relation of personal confidence between the parties; that the obligation to fix the price and terms of sale was to be exercised for their mutual benefit, without interference or hindrance by others; and that a conveyance of the lands to a third person, though made subject to the contract and accompanied by an assignment thereof, introduced an interest hostile to the agents and constituted a breach of the agency part of the contract. *Sixta v. Ontonagon Valley L. Co.* 293

15. The principal also, by transferring all its pecuniary interests in the lands and by assignment of the contract, placed itself in a position adverse to the agents' interests in respect to making sales, and made it more difficult to obtain conveyances upon such sales, and this, too, constituted a breach of the contract on its part. *Ibid.*

16. A sale by the principal of the whole tract, or the whole of the unsold lands, was within the purview of the contract, and,

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if made at less than $10 per acre, violated both the agency and option features of the contract; and such violation of either part of the agreement constituted a substantial breach thereof. *Ibid.*

17. Where a deed of the lands was fully executed and delivered, the consideration paid, and the contract assigned, there was a completed sale of the lands within the meaning of the contract, notwithstanding a clause in the deed providing that it should not take effect as a transfer of the title until the expiration of the option period and that if the optionees should elect to purchase the grantee would join with the grantor in conveying to them the lands to which they might be entitled. *Ibid.*

18. The contract having been thus breached by a sale by the principal, the agents had the right to stand on such breach, refuse to continue working under the contract, and sue for damages. *Ibid.*

19. The fact that the agents, after the lands were conveyed by the principal, reported sales negotiated by them before such conveyance, and remitted therefor, to the principal, who thereupon turned the matter over to its grantee and notified the agents thereof, did not constitute a waiver of the breach, where the agents immediately replied that they considered the agreement abrogated and would look to the principal for damages. *Ibid.*

20. The evidence as to the damages suffered by the agents by reason of being deprived of the right to continue selling the lands through the contract period, was vague and indefinite, and upon the record such damages were too remote and incapable of ascertainment. *Ibid.*

21. But, the contract being an entirety and having been breached, the agents were entitled to recover all damages proximately resulting from such breach, including those based on the option feature. *Ibid.*

22. The measure of damages for breach of an option contract is not the same as upon a contract for the sale of lands, but the optionee is entitled to recover as damages the value of the contract and to have restored to him that with which he parted for the option. *Ibid.*

23. It appearing in this case that, through sales by the agents at more than $6 per acre, a large fund had been accumulated to their credit applicable as a payment under their option, the breach of the contract operated directly to deprive them of the right of applying this sum and subsequently caused them the loss of it, and the amount thereof was recoverable as damages. *Ibid.*

24. But, upon the principle of avoidable consequences, there could be no recovery of damages for deprivation of securing the land, where the grantee of the principal agreed with the latter to convey in case the agents should elect to purchase under their option. *Ibid.*

Performance or breach. See CONTRACTS, 14–22. MUNICIPAL CORPORATIONS, 3–5. VENDOR AND PURCHASER.

As to kind or quantum of evidence to establish fact. See INDEMNITY, 1, 2.

Impairing obligation. See PUBLIC UTILITIES, 6.

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CONTRIBUTION. See EXECUTORS AND ADMINISTRATORS, 2. PARTNERSHIP.

CONTRIBUTORY NEGLIGENCE. See APPEAL, 8. AUTOMOBILES, 2. BANKS AND BANKING, 1. INSTRUCTIONS TO JURY, 3. MASTER AND SERVANT, 4, 12, 13, 17, 18, 20, 28–30. NEGLIGENCE, 6. RAILROADS, 8, 9. STREET RAILWAYS, 4–13.

CORN SHREDDERS. See NEGLIGENCE, 1–3, 8.

CORPORATIONS.

Amendment of charter: Increase of capital stock: Payment of filing fees: Railroads: Special charters and general laws.

1. Exercise of the power to increase capital stock under sec. 1826, Stats., requires an amendment to the corporate charter, within the meaning of sec. 1820, Stats. *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80. *State ex rel. Att'y Gen. v. Northern Pac. R. Co.* 73
2. Sec. 1772, Stats., regarding fees on original stock of corporations or any increase thereof, applies to railroad corporations. *Ibid.*
3. Aside from exceptions mentioned in sec. 1772, Stats., the legislative purpose was to include thereby all corporations as regards the obligation for payment of fees upon capital stock as to any corporation whether organized under ch. 86 or ch. 87 of the Statutes or an increase of capital stock of any such corporation or any existing under a special law. *Ibid.*
4. The legislative response to the constitutional mandate for the enactment of laws to supply the place of prohibited activity as to granting corporate powers by special law was intended to be harmonious; bringing substantially into one system corporations organized under general laws and those organized under special laws. *Ibid.*
5. Under the legislative plan for the creation of corporations under chs. 86 and 87, Stats., and the continued harmonious existence of corporations organized under special charters, all powers provided in the general laws for corporations created thereunder, including that to change fundamentals, were conferred on the corresponding class existing under special charters, and special rights inconsistent therewith, were superseded. *Ibid.*
6. A change in the basic feature of a corporation is an amendment, in a proper sense, to its charter, whether so denominated in the written law or in the corporate proceedings to effect the change. *Ibid.*
7. Every change in the fundamental features of a corporate charter of the class covered by ch. 87 and similar corporations existing under special laws, is an amendment within the meaning of sec. 1820, Stats. *Ibid.*
8. Under sec. 1829, Stats., railroad corporations existing under special laws possess all the powers conferred upon similar corporations existing under general laws, subject to the same restrictions and duties as if their existence were referable to the latter, including the conditions of increasing capital stock. *Ibid.*
9. An act of the legislature, specially incorporating into a special railroad charter which existed prior to the enactment of ch. 87, Stats., the provisions thereof as to increasing cor-

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porate stock, does not confer any new power on such corporation nor enlarge an old one. *Ibid.*

10. An increase by a corporation of its capital stock by a method authorized by its charter, whether such charter be found in a special or general law or both, is a change in a basic feature of the organization by the execution of a corporate power, but none the less an amendment. *Ibid.*

11. Where the capital stock of a corporation shall have been fixed by its charter, whether resting in articles of organization under the general law or in a special charter, and the corporation possesses power to increase the amount of such stock, exercise of such power is conditioned by sec. 1772, Stats. *Ibid.*

12. Mere delay by state officers to enforce performance of a duty imposed by law on a corporation does not preclude the state from enforcing such performance. *Ibid.*

13. If the attitude of executive officers of the state be such as to efficiently influence a private corporation as to requirements to efficiently increase its capital stock, such circumstance will not create an estoppel *in pais* preventing the state from a change of attitude which does not impose any new burden on such corporation. *Ibid.*

14. If a corporation fails to comply with the law as to making the record and paying the excise fee required upon increasing capital stock, because of excusable mistake in respect to the matter, but is ready and willing to strictly comply with such requirements as soon as known and conditions are created during the delay rendering annulment of the efforts to make such increase prejudicial to private and public rights,—the court may require the corporation to do, presently, what it neglected to do, seasonably, and without additional burden because of the delay and may give the late performance original validity by denying, upon equitable grounds, use of judicial remedies to any further extent. *Ibid.*

15. There is no statute of limitations barring the state from compelling a railroad company to comply with the duties incident to its existence, including the provision as to changes in capital stock. *Ibid.*

Corporate franchise. See COURTS, 1, 2. EQUITY, 2–5.

Capital stock. See CORPORATIONS, 1–3, 8–15.

COSTS.

Persons entitled: Time for perfecting judgment.

1. Where, after a verdict in plaintiff's favor, defendant moved for judgment and also moved for a new trial, the sixty days within which, under sec. 2894*a*, Stats., plaintiff must perfect his judgment in order to be entitled to costs, did not begin to run until such motions were determined. *Breen v. Arnold,* 528

2. In such a case, where the record does not show when the motions were determined, and the trial court refused to disallow costs, it will be presumed that the costs were taxed in due time. *Ibid.*

On appeal. See DIVORCE, 11.

COUNTIES. See HIGHWAYS, 1–3.

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COUNTY BOARD. See HIGHWAYS, 1, 2.

COUNTY COURTS. See APPEAL, 14, 15. EXECUTORS AND ADMINISTRATORS.

COURTS.

Supreme court: Original jurisdiction: Method of exercise.

1. The purpose of the original jurisdiction of the supreme court, which is invoked, in an application for the annulment of a corporate franchise, is to protect the general interests of the state and its people and, consistent with such purpose, use of such jurisdiction is not permissible where the result would be detrimental to such interests or unduly oppressive, notwithstanding, independently thereof, a transgression has occurred warranting the relief sought. *State ex rel. Att'y Gen. v. Northern Pac. R. Co.* 73

2. The original jurisdiction of the supreme court is not available to destroy a corporation of *quasi*-public character, to the manifest prejudice of a large number of persons not tainted with the wrong complained of, in the absence of clear wilful violation of law, affecting the very purpose of the corporate existence and there being no other way of redressing the wrong. *Ibid.*

3. If an application is made for use of the original jurisdiction of the supreme court in a particular way, or for a particular purpose, which does not seem proper, the matter will not, necessarily, be dismissed; the petition or complaint may be retained for such proceedings as may be thought appropriate to the case and directions be given accordingly. *Ibid.*

Same: Appellate jurisdiction. See APPEAL.

Circuit courts. See APPEAL, 2–4. COURTS, 6. VENUE.

County courts. See APPEAL, 14, 15. EXECUTORS AND ADMINISTRATORS.

Milwaukee civil court: Trial by jury: Denial of right: Appeal. See APPEAL, 2–4. JUDGMENT, 2. VENUE.

4. Where one party to a civil action in the Milwaukee civil court demands a jury and pays the fees required by sub. 2, sec. 19, ch. 549, Laws of 1909, the case becomes a jury case and it is not necessary for the opposing party to demand a jury. *Przybyla v. Chain Belt Co.* 216

5. The party making the demand may, before the trial, waive his right to a jury trial and if he does so will not be obliged to pay the additional trial fee, but the opponent may then insist that the case remain a jury case and pay such fee. *Ibid.*

6. Denial of the jury trial to which a party was entitled in the Milwaukee civil court is ground for reversal of the judgment of that court and the granting of a new trial in the circuit court. *Ibid.*

Police courts. See APPEAL, 16.

COVENANTS. See EASEMENTS, 2.

CRIMINAL LAW: Nature and elements of crime. See FALSE PRETENSES. MASTER AND SERVANT, 29.

CROSS-COMPLAINT. See MECHANICS' LIENS, 2.

CUMULATIVE EVIDENCE. See NEW TRIAL, 2, 6.

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DAMAGES.

Grounds of compensatory damages. See INSTRUCTIONS TO JURY, 7. SEDUCTION. VENDOR AND PURCHASER, 2.

Aggravation and mitigation. See BREACH OF PROMISE OF MARRIAGE, 2, 3. SEDUCTION, 3.

Exemplary damages. See BREACH OF PROMISE OF MARRIAGE, 3, 4. SEDUCTION.

1. Since exemplary damages rest upon vague and unmeasurable bases, the court should, and it does, exercise revisory power over such verdicts. *Luther v. Shaw,* 234

Measure of damages. See CONTRACTS, 20–24. FRAUD, 6. RAILROADS, 11.

Excessive damages. See BREACH OF PROMISE OF MARRIAGE, 1. SEDUCTION, 4.

2. An award of $2,500 for serious injury to the eyes of a stationary engineer is *held* not excessive. *Jahn v. Northwestern L. Co.* 195

3. Plaintiff having, as the result of his injury, lost the sense of hearing in one ear and partially in the other, had ten teeth and part of one jaw knocked out, and the septum of the nose crowded to one side so as to totally close one opening, and having been unconscious for a long time, in the hospital for twenty-two days, and subject since to spells of dizziness when working, an award of $5,000 was not excessive. *Athanasiou v. Garton Toy Co.* 280

4. Where the earning power of deceased, who was thirty-two years of age and left surviving him a wife and three small children, was about $425 a year, damages in excess of $5,000 for his death would be regarded as excessive. *Sadowski v. Thomas F. Co.* 443

5. If at the time of the first assault upon him plaintiff was engaged in stealing the property of the defendant, the damages recoverable by him under the evidence in this case should not exceed $500. *Zimmerman v. Northern Pac. R. Co.* 514

6. An award of $5,000 for the death of a workingman forty-nine years old is *held* excessive, where the evidence showed that he left a widow but no other dependents, that he was always in good health and could earn "good wages," but did not show how much he earned or could earn *per diem* or that he had accumulated or would have been likely to accumulate any property. An option is given to take judgment for $3,000. *Belstner v. Sumner,* 556

Inadequate damages.

7. A verdict awarding $70 as damages for an assault by shooting was properly set aside in this case on the ground that the amount awarded was inadequate. *Gosczinski v. Carlson,* 551

DEATH. See ABATEMENT AND REVIVAL. DAMAGES, 4, 6. HIGHWAYS, 4. MASTER AND SERVANT, 23. PRIZE FIGHTING. RAILROADS, 3–6, 9, 13, 14. STREET RAILWAYS, 9, 13.

DEEDS.

Requisites and validity. See EVIDENCE, 3, 4.

Construction and operation. See EASEMENTS, 4, 5.

1. Deeds, like other instruments, should be construed so as to arrive at the intention of the parties. If there is no ambiguity,

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this must be arrived at from the language used; and effect should be given to all of the provisions if that be possible without doing violence to the language. *Polebitzke v. John Week L. Co.* 377

Same: When a mortgage. See MORTGAGES, 1, 2.

Same: Conditions subsequent: Support of aged persons.

2. Conveyances made by aged people in consideration of support and care are deemed to be conveyances upon condition subsequent, and will be set aside by a court of equity upon proof of substantial failure to perform. *Young v. Young,* 424

3. Although in such a case the husband held the legal title to the property conveyed, the wife has such a substantial interest in the carrying out of the contract that she may bring an equitable action alone (if the husband refuses to become a plaintiff) for reconveyance of the land and rescission of the agreement, joining the husband as a defendant; and this is especially true when the homestead was a part of the premises conveyed. *Ibid.*

4. Where the agreement for support also provides for the payment of money to third persons and makes such payment a charge on the real estate conveyed, such third persons are not only proper but necessary parties to the action for rescission, in order that their interests in or liens upon the real estate may be bound by the judgment. *Ibid.*

[5. Whether in this case the parties would be entitled to any other relief than the revesting of the title and the rescission of the agreement, not decided.] *Ibid.*

DEMURRER. See CONTRACTS, 11. NUISANCES, 2. PLEADING, 1–11. STREET RAILWAYS, 4.

DEPOSITIONS. See APPEAL, 4. DIVORCE, 1. OFFICERS, 4.

DEPOSITS. See BANKS AND BANKING, 1.

DIRECTING VERDICT. See MASTER AND SERVANT, 26, 31. NEGLIGENCE, 8.

DISCHARGE. See MASTER AND SERVANT, 1–3.

DISCRETION. See DIVORCE. EQUITY, 3, 5. NEW TRIAL, 2, 5. PLEADING, 10.

DISMISSAL AND NONSUIT. See DIVORCE, 6, 7. JUDGMENT, 2. NEW TRIAL, 4.

DIVORCE.

Trial: Denial of hearing: Misconduct of both parties: Order for support.

1. In an action by a husband for a divorce the refusal of the court, at the close of the plaintiff's evidence, to hear the evidence of defendant or her witnesses practically denied her a hearing and was prejudicial error, although her deposition, taken upon her examination as an adverse witness, was before the court. *Voss v. Voss,* 430

2. Where, in an action by the husband, the evidence was that plaintiff's misconduct was grossly immoral and unjustifiable and that much of the improper conduct of the wife was provoked by his misconduct, plaintiff is not entitled to a divorce. *Ibid.*

3. Divorces must be granted on legal grounds, not upon the views of the court as to the propriety or advisability of the parties continuing to live together. *Ibid.*

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4. In this case, upon denial of the divorce asked by the husband, an order should be made under sec. 2366, Stats., for the support of the wife and child. *Ibid.*

Allowance for support of child: Revision of judgment: Independent action: Abatement. See DIVORCE, 4.

5. A provision in a divorce judgment for the support of a minor child may be revised or altered upon application to the court under sec. 2369, Stats., even though such provision was embodied in a trust agreement made between the parties whereby a trustee was vested with a trust fund to be devoted to such support, the agreement having been approved by the court and made a part of the judgment. *Yates v. Yates,* 219

6. An independent action to annul that part of the divorce judgment because of circumstances which had arisen subsequent to its entry was wrong in practice and should have been dismissed for want of jurisdiction. *Ibid.*

7. Death of the divorced wife and the situation created thereby warranted in this case a revision of the judgment and termination of the trust agreement, which contemplated that the child was to reside with the mother; but an application and an order for cancellation of that agreement should not have been based upon the ground that, through inadvertence, the agreement did not provide for its termination in the event of such death, nor upon the ground that, the death having occurred within a year after entry of the judgment, the divorce action abated. *Ibid.*

Property rights. See EQUITY, 7.

Division of property: Discretion: Unnecessary appeal: Costs.

8. The division of property upon the granting of a divorce is peculiarly a matter resting in the discretion of the trial court, subject to such rules as have been established by the supreme court. *Gauger v. Gauger,* 630

9. In general, a clear third of the whole property to be divided is a liberal allowance to the wife, subject to be increased or decreased according to special circumstances. *Ibid.*

10. In this case the trial court, after giving due weight to all matters proper to be considered, having divided the property about equally between the husband and wife, such division is *held* to be obviously fair to the wife. *Ibid.*

11. Under such circumstances, there being no good reason why the wife should have appealed to the supreme court, the husband is not, as he would be in ordinary cases, charged with her costs, other than clerk's fees, upon affirmance of the judgment. *Ibid.*

DOCUMENTARY EVIDENCE. See EVIDENCE, 5.

DRAFTS. See BILLS AND NOTES.

DUE PROCESS OF LAW. See MARRIAGE, 8.

DURESS. See CONTRACTS, 1.

EASEMENTS.

1. In the case of an easement the title does not pass, but only a right of use or privilege in the land of another; while in the case of a limited fee the title does pass, even though the use be limited. *Polebitzke v. John Week L. Co.* 377

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2. The grant of a fee may be coupled with a restriction upon the right of use, and such restriction may be in the nature of a condition subsequent or a mere covenant, depending on circumstances. *Ibid.*

3. Conditions subsequent must be created either in express terms, as by a statement of the condition coupled with a reverter clause, or by clear implication; and they are most strongly construed against the grantor. *Ibid.*

4. A deed conveying a strip of land one rod wide bordering on a river, "for the purpose of rafting and boomage," and containing the usual granting clause appropriate to convey a fee, together with the ordinary *habendum* clause and covenants of warranty, is *held* to convey at least a limited fee in the strip of land described, for the use specified, and to entitle the grantee and its assigns to permit logs drifted thereon in the course of being driven down the river to a boom below, to remain there as long as desired without liability for trespass. *Ibid.*

5. The words "for the purpose of rafting and boomage" in such deed are entirely inadequate to create a condition subsequent. *Ibid.*

6. It may be that if such strip of land were put to some different use which materially interfered with the use and enjoyment of the grantor's adjoining land, that use might be enjoined by a court of equity and the damages resulting therefrom might be recovered, but this is not decided. *Ibid.*

ELEVATORS. See LANDLORD AND TENANT. MASTER AND SERVANT, 18–22.

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 1, 2, 37–42.

EMPLOYERS' LIABILITY ACTS. See RAILROADS, 6, 7, 11–13. WORKMEN'S COMPENSATION ACT.

ENTIRE CONTRACTS. See CONTRACTS, 21.

EQUAL PROTECTION OF LAWS. See CONSTITUTIONAL LAW, 14.

EQUITY.

Jurisdiction: Remedies: Effect of delay: Proceedings nunc pro tunc. See DEEDS, 3–5. NUISANCES, 1. PLEADING, 5, 6. TRESPASS.

1. Rights as regards remedies may, by countervailing equities, under some circumstances, be superseded as to the state. *State ex rel. Att'y Gen. v. Northern Pac. R. Co.* 73

2. The right of the state to a judicial remedy to forfeit a corporate franchise may be superseded by delay in connection with other circumstances. *Ibid.*

3. Whether delay and characterizing circumstances are such as, upon equitable grounds, to supersede the remedy of the state to punish a corporation by annulling its charter for nonuse or misuse thereof, rests in sound judicial discretion. *Ibid.*

4. The judicial power upon equitable conditions to permit an act to be done *nunc pro tunc*, technically applies only to acts omitted to be seasonably done in judicial proceedings; but a court of equity has power, in the interest of justice, to permit things to be efficiently done, outside of judicial proceedings, and the exercise of such power is in the nature of granting a privi-

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lege to do the thing *nunc pro tunc*, and may properly be spoken of as such. *Ibid.*

5. What may or may not be permitted by the court in the field of equity jurisdiction, is limited by the justice of the case and, with all parties before it or represented, the court, within the limits of fair judicial discretion, is the judge of the means and manner and the measure of redress. *Ibid.*

Same: Clean hands.

6. Inequitable conduct of the plaintiff in other or different transactions is not a bar to equitable relief in the transaction involved in an action, if he is otherwise entitled to that relief. *Luebke v. Salzwedel,* 601

7. Thus, even if the plaintiff attempted or intended to defraud his wife (who was about to sue for a divorce) by a conveyance of his land which he neither delivered nor recorded, he is not debarred from equitable relief against the grantee named in such undelivered deed who fraudulently or without his consent obtained possession thereof and had it recorded. *Ibid.*

Same: Laches. See CORPORATIONS, 12. EQUITY, 3.

ESCAPE. See SHERIFFS.

ESTOPPEL. See CORPORATIONS, 13. MUNICIPAL CORPORATIONS, 2, 20, 21, 26. PARTIES, 1. PUBLIC UTILITIES, 7.

EUGENIC MARRIAGE LAW. See CONSTITUTIONAL LAW, 1-3. MARRIAGE.

EVIDENCE.

Judicial notice.

1. It is not a matter of common knowledge, of which judicial notice can be taken, that a drill-press operator who had partially lost the sight of one eye would probably be discriminated against in the matter of employment. *International H. Co. v. Industrial Comm.* 167

Presumptions. See ADVERSE POSSESSION, 4, 5. FRAUD, 3.

Burden of proof. See BANKS AND BANKING, 2. HUSBAND AND WIFE, 2, 9. INSTRUCTIONS TO JURY, 2.

2. The burden is upon a party alleging fraud to prove it by clear and satisfactory evidence. *Milwaukee W. Mills v. Winsor,* 538

Relevancy and materiality. See HUSBAND AND WIFE, 11. INDEMNITY, 1, 2. INSTRUCTIONS TO JURY, 4, 5.

3. Exclusion of preliminary questions intended to lead up to proof that a deed to one of the defendants was forged was not error where the purpose of such questions was not indicated and no issue of forgery was raised by the pleadings. *Hathaway v. Arnold,* 22

4. The question being whether a defendant was a *bona fide* purchaser of certain land conveyed to her before the action was commenced, evidence of the filing of notice of *lis pendens* before her conveyance was recorded was immaterial. *Ibid.*

Hearsay evidence. See EVIDENCE, 7.

Documentary evidence: Baptismal record.

[5. Whether or not a church baptismal record was competent evidence of the date of a child's birth, not determined.] *Illinois Steel Co. v. Budzisz,* 16

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Parol evidence affecting writings. See CONTRACTS, 1. MUNICIPAL CORPORATIONS, 20.

6. In an action to recover a balance alleged to be due upon account for goods sold and delivered, although the invoices, bills of lading, and some expressions used by the parties in their correspondence were such as might naturally be used in case of sales, yet, there being also in the writings numerous indications that only an agency arrangement existed, and among them a bond given by defendant reciting that he had been appointed plaintiff's agent and was faithfully to perform the duties of such agency, oral testimony to the effect that the true relationship of the parties was that of principal and agent was properly admitted and was sufficient to sustain a verdict for defendant. *Walter Brothers B. Co. v. Kluck,* 388

Best and secondary evidence: Copies.

7. A statement as to the vendee's solvency, claimed to have been made by it to a credit agency, was properly excluded, because it was not the original statement and no foundation had been laid for introduction of a copy. *Milwaukee W. Mills v. Winsor,* 538

Opinion evidence. See MASTER AND SERVANT, 11.

Weight and sufficiency. See ADVERSE POSSESSION, 2, 3. ATTORNEY AND CLIENT, 1. BILLS AND NOTES. BROKERS, 4. CONTRACTS, 20. EVIDENCE, 6. FRAUD, 2, 3. GIFTS. HIGHWAYS, 4. HUSBAND AND WIFE, 3. INDEMNITY, 1, 2. INSTRUCTIONS TO JURY, 4. MASTER AND SERVANT, 13, 17–22, 26. MORTGAGES, 2. PRIZE FIGHTING. PUBLIC UTILITIES, 2, 3. RAILROADS, 3. TRESPASS. WORKMEN'S COMPENSATION ACT, 7.

EXCESSIVE DAMAGES. See BREACH OF PROMISE OF MARRIAGE, 1. DAMAGES, 2–6. SEDUCTION, 4.

EXECUTORS AND ADMINISTRATORS.

Collection of estate. See GIFTS.

Widow's allowances.

1. Where the widow of a decedent neither selected her statutory allowance of $200 nor made claim to it during her lifetime, her administrator was not entitled to recover it after her death. *Estate of Hemphill,* 331

Claims: Time for presentation.

2. Where a right of contribution from the estate of a decedent did not accrue until payment of a judgment, which was after the expiration of the time limited for presentation of claims against the estate, such claim might, under sec. 3860, Stats., be presented at any time within one year after it so accrued. *Estate of Ryan,* 576

Liability for judgment against estate. See JUDGMENT, 1.

Accounting. See APPEAL, 14, 15.

Same: Compensation.

3. An administrator who, after filing his final account, continued in charge of a farm which was devised to the widow for life, collecting and disbursing the rents until her death, during which time he performed no other acts as administrator, should be allowed compensation out of the fund so handled, in a proceed-

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ing by her administrator for an accounting, whether he was to be considered as acting as a trustee or merely as her agent. *Estate of Hemphill,* 331

Same: Attorneys' fees.

4. Where items in an executors' final account for attorneys' fees upon a contest of the will in different courts were objected to in the county court and an appeal taken by one of the executors from their allowance, the dismissal of such appeal was not a mere technical error, the appellant being entitled to a hearing in the circuit court as to the reasonableness of the charges and as to the power of the county court to fix the amount and authorize payment of fees for services in other courts. *Will of Hyde,* 462

EXEMPLARY DAMAGES. See BREACH OF PROMISE, 3, 4. DAMAGES, 1. SEDUCTION.

EXPERT TESTIMONY. See MASTER AND SERVANT, 11.

EXPRESS TRUSTS. See ABATEMENT AND REVIVAL.

FALSE PRETENSES.

Information: Sufficiency: Instructions to jury.

1. An information charging in substance, among other things, that defendants designedly and with intent to defraud obtained from one R. certain personal property, and also obtained his signature to a bill of sale thereof and to a deed conveying his farm to one of the defendants, by means of false pretenses and representations that said grantee was a man of great wealth, worth more than $60,000, and of high standing and credit, that two notes and a mortgage given by said defendant to R. were good and sufficient security for the purchase price of said farm and property, and that said mortgage conveyed and was a lien upon said farm and was given to secure the purchase price thereof, is *held* to state an offense under sec. 4423, Stats. *Krenn v. State,* 439
2. The representations so alleged were of existing facts, not mere promises or expressions of opinion, except the statement as to the sufficiency of the notes and mortgage as security, and the jury having been properly instructed that that statement did not constitute false pretenses in any view, there was no prejudicial error. *Ibid.*

FALSE REPRESENTATIONS. See FALSE PRETENSES. FRAUD, 5, 6. SALES, 1.

FEES. See CORPORATIONS, 2, 14. EXECUTORS, 4.

FELLOW-SERVANTS. See MASTER AND SERVANT, 24–27. RAILROADS, 7.

FIDELITY INSURANCE. See INDEMNITY.

FIREMEN RELIEF ASSOCIATION. See INSURANCE, 2, 3.

FORECLOSURE. See MORTGAGES, 3–6. MECHANICS' LIENS.

FORFEITURE. See MASTER AND SERVANT, 29.

FORGERY. See EVIDENCE, 3. PLEADING, 10.

FORMER ADJUDICATION. See JUDGMENT, 2, 3.

FRANCHISES. See COURTS, 1, 2. EQUITY, 2–5. MUNICIPAL CORPORATIONS, 22–24. PUBLIC UTILITIES, 4, 5, 7.

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FRAUD.

Acts constituting fraud. See BANKS AND BANKING, 1. FALSE PRETENSES. HUSBAND AND WIFE, 6, 7. INDEMNITY, 4.

Same: Conveyance of land: Bona fide purchasers: Imputed knowledge.

1. A transaction by which a married woman acquires title, ostensibly in the character of a *bona fide* purchaser, to land which her husband had previously secured from another by fraud, is naturally and properly viewed with suspicion by the courts. *Hathaway v. Arnold,* 22

2. But in this case, it appearing that the wife had a separate estate, and nearly all the direct evidence tending to show that she paid full value for the land to a corporation in which the title had been vested, and that she had no knowledge of the fraud, it is *held* that a finding of the trial court to the effect that she was a *bona fide* purchaser should not be set aside unless knowledge of the fraud was chargeable to her as a matter of law. *Ibid.*

3. The trial court having in substance found upon sufficient evidence that the husband did not act as his wife's agent in the transaction in question, there is no conclusive presumption that she had knowledge of his fraudulent acts affecting such transaction. *Ibid.*

4. Where the information which an agent has of previous transactions and his relation thereto are of such a character that he would not disclose to his principal a fraud which had been perpetrated by him therein, notice of such fraud is not imputable to the principal as a matter of law. *Ibid.*

Same: Joint adventurers: Duties: Negligence.

5. When a person induces another to purchase land by making materially false representations as to its quality or quantity under circumstances which entitle the vendee to rely thereon, the vendee may rescind the contract and recover the purchase money, or may affirm the sale and recover the damages which he sustains; and this he may do whether the representations were made fraudulently or merely negligently. *Knudson v. George,* 520

6. A woodsman and cruiser who induced other persons to buy certain land as a joint adventure with him, they furnishing the money and he receiving a one-third interest in the land, owed to them a duty, not merely to exercise good faith and ordinary care in locating the land to be purchased, but to exercise that higher degree of diligence and skill which a woodsman of his supposed skill ordinarily exercises under like circumstances; and if by failing to perform that duty he misled them as to the land they were getting, they are entitled to recover from him their damages, consisting of the difference between the value of the land actually bought and that which he led them to believe they were buying. *Ibid.*

Evidence of fraud. See EVIDENCE, 2.

FRAUDULENT REPRESENTATIONS. See SALES.

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GARNISHMENT.

1. The impounding of property or money by garnishment must be accomplished by the process when the suit is instituted under the conditions provided by the statutes. *Thomas v. Citizens Nat. Bank*, 635
2. The appearance of a nonresident in a court of this state to assert his right to property in this state which has been garnished, cannot give the court jurisdiction to garnish property or a debt situated outside of the state. *Ibid.*

GIFTS.

In an action of replevin brought by an administrator to recover certificates of deposit which had belonged to his intestate, testimony of the defendant and her daughter (with whom the intestate was boarding and who took care of him in his illness), corroborated by other evidence tending to show that he did not wish his children to have his property, is *held* to sustain a finding by the trial court to the effect that, after suffering a stroke of paralysis which caused his death three days later, the intestate made a valid gift to defendant of said certificates. *Christensen v. Christopher*, 525

GOOD FAITH. See APPEAL, 16. ATTORNEY AND CLIENT, 2.

GROSS NEGLIGENCE. See NEGLIGENCE, 7. STREET RAILWAYS, 9-12.

GUARANTY. See INDEMNITY.

HARBORS. See MUNICIPAL CORPORATIONS, 10-21.

HEALTH.

See MARRIAGE.

1. In the exercise of its police power the state may enact reasonable health regulations, and only when the power has been clearly abused will the courts declare such regulations void. *Koeffler v. State*, 434
2. A statute (sec. 1636—151, Stats. 1911) providing that "the owner of every apartment house, tenement house, lodging or boarding house, shall furnish suitable covered receptacles for garbage, ashes and rubbish," was not invalid as being unreasonable and oppressive, nor because of indefiniteness in that it failed to define specifically the kind of receptacles to be provided. *Ibid.*
3. Such a provision contained in a health statute should not be held void merely because some other provision of the statute, dealing with a different subject, might be invalid. *Ibid.*

HEARSAY EVIDENCE. See EVIDENCE, 7.

HIGHWAYS.

Adoption as county roads: Repair: Mandamus.

1. Under a statute (sec. 1308, R. S. 1878) authorizing county boards to adopt main traveled highways as county roads, but not prescribing the method of such adoption, a formal resolution of the county board was sufficient for that purpose. *State ex rel. Johnson v. Hintgen*, 355
2. Conceding, but not deciding, that resolutions of a county board were not effective as an adoption because the road in question

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had not then been constructed or traveled and hence was not a "main traveled highway," a resolution passed after the opening of the highway, and evidently intended to cure every possible flaw in the former proceedings, should, although inartificially expressed, be given effect as an adoption of the highway. *Ibid.*

3. Unless there are funds in the county treasury which may properly be used for the purpose of repairing a county highway, the county highway commissioner cannot be compelled by *mandamus* to do the work. *Ibid.*

Injuries from defects: Death: Proximate cause.

4. In an action for the death of plaintiff's intestate, alleged to have been caused by injuries received when he fell from a wagon by reason of a defect in a highway, the evidence (consisting largely of the opinions of medical experts) was sufficient to make it a jury question whether the cerebro-spinal meningitis of which he died resulted from such fall. *Belstner v. Sumner*, 556

HOMESTEAD. See DEEDS, 3. MORTGAGES, 4, 5.

HUSBAND AND WIFE.

See DIVORCE. MARRIAGE.

Antenuptial agreement: Validity: Burden of proof: Construction.

1. There is nothing inherently suspicious about antenuptial contracts, and in the absence of unfair characterizing circumstances they are to be regarded with favor rather than disfavor. *Oesau v. Estate of Oesau*, 255

2. In general, the burden is upon the one impeaching such a contract to show its invalidity; but if there is anything about it, considering all the circumstances, indicating that the intended wife was unduly influenced to make it, that will overcome its *prima facie* validity. *Ibid.*

3. In this case an antenuptial contract between a widower sixty-eight years of age and a widow of sixty-two, each of whom had a family of grown-up children and a substantial fortune and was thoroughly capable of managing all personal affairs, by the terms of which each was to retain ownership, control, and the right to dispose of his or her own property the same as if unmarried, is *held*, upon the evidence, to have been fairly and understandingly made and not to be impeached by any circumstance. *Ibid.*

4. The fact that such contract expressly provided that in case either party should die intestate the property of such party should go to his or her own descendants the same as if no marriage had taken place, does not permit a construction rendering the agreement ineffective in case of the testacy of the husband and entitling the widow in such case to claim statutory rights in his estate—that being contrary to the plain purpose of the contract. *Ibid.*

5. The intention of the parties at the time such contract is made is to be taken as its legal meaning if it can be found expressed in the language used. If such intention is clearly expressed, rules for construction are unnecessary; but where there is uncertainty as to which of two or more reasonable meanings the

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minds of the parties met upon, that one should be taken which is most favorable to the woman from the point of view of the parties when it was made. *Ibid.*

Conveyances between husband and wife. See FRAUD, 1-3.

6. As to a conveyance from husband to wife made after the enactment of ch. 86, Laws of 1895 (which by amendment to sec. 2342, R. S. 1878, removed a wife's disability to take real estate by gift or grant from her husband and provided that any such conveyance should be "valid to the same extent as between other persons"), the question of fraud is, under sec. 2323, Stats., one of fact and not one of law. Anything said to the contrary in *Oppenheimer v. Collins*, 115 Wis. 283, is overruled. *Ripon Hardware Co. v. Haas*, 466

7. Earlier decisions of this court, made before said amendment, are inapplicable to such a conveyance, except in so far as they hold that transactions of that nature should be closely scrutinized because of the great inducement and facilities afforded for the commission of fraud. *Ibid.*

Disabilities and privileges of coverture. See MORTGAGES, 4, 5.

Actions against third persons. See DEEDS, 3.

Alienation of wife's affections: Justification: Malice: Evidence: Communications to brother: Instructions to jury.

8. A brother has the right to advise a married sister to discontinue her marital relations with her husband if he honestly believes that conditions are such as to demand separation, provided he acts in good faith and has substantial reasons for believing that the advice given is proper. *Baird v. Carle*, 565

9. If in such a case separation ensues and the husband brings an action for alienation of his wife's affections, he must allege, and the burden is upon him to show, that the advice which tended to bring about the separation was given maliciously and in bad faith. *Ibid.*

10. Where in such a case plaintiff alleged and attempted to prove that the defendant brother acted in bad faith and from malicious motives, defendant had the right to prove facts in justification under the rule above stated, although he did not plead justification. *Ibid.*

11. Defendant was properly permitted in such a case to testify to communications made to him, before he advised the separation, by a physician and a lawyer whom his sister had consulted in the matter. The admissibility of such testimony does not involve any question as to whether such physician or lawyer would be a competent witness upon the trial, nor as to the accuracy or correctness of the information given by them to defendant, provided it was such that he might reasonably rely thereon. *Ibid.*

12. In an instruction to the jury, in such case, that the mere fact that defendant "induced or enticed" his sister "to live apart from her husband, and that they had previously lived happily together, is not sufficient to make him liable or to raise a presumption that his motive was malicious, as would be the case if he were a stranger to" the wife, the use of the word "enticed" was unfortunate, but when the quoted sentence is taken in connection with what preceded and what followed it, the instruction was not likely to be misleading; and in view of the evidence the error, if any, was not prejudicial. *Ibid.*

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13. Requested instructions in such case, to the effect that it is not necessary to the right of action that defendant's conduct be the sole cause of the alienation, but it is sufficient if his conduct was the controlling cause, and that evidence of indifference or cruelty of the husband to the wife prior to the alienation and of the unhappiness of their domestic relations only goes to the mitigation of damages and not to a justification of a malicious act of the defendant in causing the separation, were correct and might properly have been given; but, the evidence that defendant acted either maliciously or in bad faith being very slight, the refusal of such instructions was not prejudicial error. *Ibid.*

ILLEGAL CONTRACTS. See COMMERCE. CONTRACTS, 4–13.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1–21.

INADEQUATE DAMAGES. See DAMAGES, 7.

INDEMNITY.

1. Parties to a contract may effectively provide for the kind or quantum of evidence necessary, in the absence of fraud, to conclusively establish a fact. *Illinois S. Co. v. Maguire,* 49

2. Thus, in a contract to indemnify a guaranty company for all loss sustained by reason of a bond executed by said company guaranteeing fidelity of an employee, a provision that "the vouchers or other proper evidence showing payment by said guaranty company of any such loss, . . . shall be conclusive evidence (except for fraud) . . . of the fact and amount" of the liability of the indemnitor to said company, was valid and binding. *Ibid.*

3. Such contract did not make the indemnitor a surety upon the bond, and a waiver by the guaranty company of requirements in that bond as to notice and proof of loss by the employer did not, in the absence of fraud, release the indemnitor from liability. *Ibid.*

4. A loss by the employer, covered by the bond, and payment by the guaranty company being clearly shown, a mere waiver of certain requirements of the bond and the absence of an indorsement by an indorsee of the employer on the check by which payment was made were not sufficient to establish fraud. *Ibid.*

INDETERMINATE PERMITS. See PUBLIC UTILITIES, 4–7.

INDICTMENT AND INFORMATION. See FALSE PRETENSES, 1.

INFANTS.

Contracts.

1. An infant cannot make a valid contract appointing an agent or employing a servant. *Covault v. Nevitt,* 113

2. A contract under which a person was employed by an infant as janitor to care for the infant's store building was not a contract for necessaries under which a liability could be enforced not for the benefit of the infant. *Ibid.*

Torts. See NEGLIGENCE, 4–6.

3. An infant owner of property is not liable *respondeat superior* for the negligent act of a person in his employment and in charge of the property, where the infant in no way personally participated in such act. *Covault v. Nevitt,* 113

INJUNCTION. See TRESPASS.

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INSTRUCTIONS TO JURY.

General rules. See APPEAL, 9. TRIAL, 3.

Same: Reinstruction: Absence of attorneys.

1. Where counsel voluntarily leave court after the jury has been sent out to deliberate upon their verdict, the judge is under no obligation either to send or to wait for them before reinstructing the jury or receiving their verdict; but if their attendance can be procured without unreasonable delay, it is better practice to do so. *Walczakowski v. Milwaukee E. R. & L. Co.* 191

Same: Correcting inaccuracies before jury retires. See TRIAL, 3.

Requests for instructions. See HUSBAND AND WIFE, 13.

Alienation of wife's affections. See HUSBAND AND WIFE, 12, 13.

Burden of proof. See APPEAL, 10.

2. An instruction to the effect that the burden of proof is on the party asserting title by adverse possession to satisfy the minds of the jury "by a fair preponderance of the evidence to a reasonable certainty," was not prejudicially erroneous. *Zellmer v. Martin,* 341

Contracts. See ATTORNEY AND CLIENT, 1.

Contributory negligence.

3. In charging the jury upon the question of contributory negligence it is proper to call their attention to the concrete situation and to instruct them to take into consideration all the facts and circumstances disclosed by the evidence, including plaintiff's specific conduct. The charge upon that subject in this case, though not strictly accurate, is *held* not to have been misleading. *Athanasiou v. Garton Toy Co.* 280

Damages. See RAILROADS, 13, 14. SEDUCTION, 2.

False pretenses. See FALSE PRETENSES, 2.

Fraudulent representations. See SALES, 2.

Negligence. See STREET RAILWAYS, 3.

Ordinary care. See NEGLIGENCE, 5.

Quantum of evidence necessary.

4. Except as to certain special issues, such as fraud and the like, the jury in a civil action are required to be convinced or satisfied of a fact by the preponderance of the evidence only, and it is error to charge them that the evidence must be "clear and convincing." *Brennan v. Healy,* 37

5. Such error will not be regarded as prejudicial, however, where the trial was fairly conducted and the charge as a whole was favorable to the party complaining, and where the evidence in his favor upon the issue in question was very slight or practically negligible, so that there would be little probability of a different result upon another trial. *Ibid.*

Right to recover.

6. In case of a special verdict, a general instruction touching the general question of the right of recovery has no proper place in the charge. *Belstner v. Sumner,* 556

Seduction: Damages. See SEDUCTION, 2.

7. In an action for damages by reason of the seduction of plaintiff's daughter, an instruction that the jury might consider the

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financial condition of the defendant was not objectionable as carrying the meaning that he had property or prospects; and the fact that in assessing the damages the jury did not consider his lack of property did not constitute error. *Luther v. Shaw*, 234

INSURANCE.

Casualty insurance: Automobiles: Collision.

1. Damage to an automobile caused by its running off the main road and down a bank into a river was not covered by a policy insuring against damage "by being in collision . . . with any other automobile, vehicle or object, excluding . . . damage caused by striking any portion of the roadbed." *Wettengel v. United States "Lloyds,"* 433

Fidelity or guaranty insurance. See INDEMNITY.

Firemen relief association.

2. Under sec. 1987, Stats., and sec. 3, art. XI, of the articles of association of the Firemen Relief Association of the City of Milwaukee, the mere fact that a member of that association ceased to be an active member of the fire department of the city did not operate to cancel his certificate of membership or forfeit the beneficiary rights so long as his name remained on the rolls as that of a member in good standing. *Anderson v. Firemen Relief Asso.* 199

[3. Whether a member of the fire department of the city of Milwaukee—in this case one whose particular duty was to attend to the boiler on a fire boat—was an officer whose office became vacant under sec. 962, Stats., when he was adjudged insane, not determined.] *Ibid.*

INTEREST.

See TRUSTS AND TRUSTEES. VENDOR AND PURCHASER, 4.

A lease provided in terms that the rent or any part thereof not paid when due should bear interest from the time it became due. The arbitrators found that the lessor was entitled to receive as rent during the renewal period $10 per horse power per annum, payable quarterly in advance according to the terms of the lease. It appearing that both parties were to blame for the delay in having the rental fixed and had proceeded upon the assumption that there would be an equitable accounting and adjustment when it should be fixed, it is *held* that the lessor was entitled to interest on the unpaid difference in the rent from the dates when it should have been paid had the rental been fixed at the commencement of the renewal period. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co.* 412

INTERSTATE COMMERCE. See COMMERCE. RAILROADS, 6.

INTERVENTION. See GARNISHMENT, 2.

INTOXICATING LIQUORS.

The ratio limit fixed by sec. 1565*d*, Stats., having already been exceeded in a town, no license could be granted for the sale of liquor therein upon premises which, though used under a valid license for saloon purposes up to June 30, 1907, had thereafter for more than three years ceased to be used for such purposes, where the applicant was not a person who, for the reasons stated in said section, might be licensed to continue the sale of liquor in a changed location. *Koch v. State*, 437

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JOINDER.
Of causes of action. See NUISANCES, 2. PLEADING, 2–8.
Of parties. See DEEDS, 3.
JOINT ADVENTURES. See FRAUD, 5, 6.

JUDGMENT.

Construction and operation.

1. In an action brought by an administrator, a judgment that the defendant "recover from the plaintiff" six cents damages and the costs of action is construed as a judgment against plaintiff as administrator and not individually. *Christensen v. Christopher*, 525

Opening or vacating. See APPEAL, 2, 5.

Order for judgment: Construction. See PLEADING, 9.

Revising or modifying. See DIVORCE, 5–7.

Conclusiveness. See PARTIES, 1.

2. Where, in an action of replevin in the Milwaukee civil court, the record shows that the issues were not tried upon evidence and that judgment of dismissal was awarded on the ground that plaintiff had not proven a cause of action, such judgment constituted a nonsuit and was not a bar to another action upon the same cause. *Toledo C. S. Co. v. Polanis*, 312
3. To render the judgment in one case *res judicata* as to the rights of the parties in another case upon a different cause of action, it must appear that the questions were actually litigated and decided in the former case. *Estate of Ryan*, 576

JUDICIAL DISCRETION. See EQUITY, 3, 5.

JUDICIAL NOTICE. See EVIDENCE, 1.

JURISDICTION. See APPEAL, 5. COURTS, 1–3. DIVORCE, 6. EQUITY, 1–5. GARNISHMENT, 2. MUNICIPAL CORPORATIONS, 2. TAXATION.

JURY. See APPEAL, 8, 9, 11. BREACH OF PROMISE OF MARRIAGE, 4. COURTS, 4–6. PRIZE FIGHTING, 2. SEDUCTION, 2. TRIAL, 3.

JUSTIFICATION. See ASSAULT AND BATTERY, 1. HUSBAND AND WIFE, 10. MASTER AND SERVANT, 1–3.

LACHES. See CORPORATIONS, 12. EQUITY, 3.

LAND CONTRACTS. See MORTGAGES, 3–6. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Negligence: Defective elevator: Injury to invitee: Duty and liability of tenant.

1. Where one of several tenants of a building employed plaintiff to perform a casual service, impliedly inviting him to use in performing it the elevator furnished by the landlord for the common use of all of said tenants, the relation of master and servant did not exist between such tenant and the plaintiff in respect to the elevator, nor the relation of carrier and passenger, but that of invitor and invitee, and the duty which the tenant owed to plaintiff was that of ordinary care only. *Smith v. Lederer*, 479
2. Where, in such case, the landlord had agreed or assumed to keep the elevator in repair, ordinary care on the part of the tenant toward his invitee did not include the duty to make an expert

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examination of the machinery for the purpose of discovering defects therein, but he might rely on the obligation of the landlord to perform that duty in the absence of a known breach of such obligation or notice of facts sufficient to put him upon inquiry. *Ibid.*

3. Where such tenant, shortly before the injury complained of, notified the landlord that the elevator was out of repair, and the latter sent a man to repair it, and afterward the tenant's agent looked for and found evidences that repairs had been made, operated it, and from the manner in which it worked concluded that suitable repairs had been made, the tenant was not liable for an injury suffered by plaintiff in the use of such elevator by reason of the insufficiency of such repairs. *Ibid.*

4. Ordinary care would require the tenant to warn his casual employee of any danger of which he knew, or ought to have known, but the duty to keep the elevator in a reasonably safe condition did not rest upon him. *Ibid.*

LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 1-3. HEALTH. MARRIAGE. MUNICIPAL CORPORATIONS, 24, 25.

LIBEL AND SLANDER.

1. Spoken words which, taken as a whole and in their natural, popular, and common acceptance, would be understood by persons of average intelligence as stating that plaintiff was guilty of a criminal offense, are actionable *per se*. *Culver v. Marx*, 320

2. If there is reasonable ground for conflicting inferences as to how the alleged slanderous words would naturally be understood, the complaint should not be held bad, but the jury should be permitted to say what the correct inference is. *Ibid.*

3. Language which would naturally be understood as stating that plaintiff assisted her husband in keeping a house of ill-fame by promiscuous sexual intercourse with men who visited the place, and that she also followed the practice of getting men into compromising positions so that the husband could extort blackmail from them, was slanderous *per se*. *Ibid.*

LICENSES. See INTOXICATING LIQUORS.

LIMITATION OF ACTIONS. See ADVERSE POSSESSION. CORPORATIONS, 15.

LIMITED FEE. See EASEMENTS, 1, 4.

LIS PENDENS. See EVIDENCE, 4.

MACHINERY. See MASTER AND SERVANT, 5-12.

MALICE. See HUSBAND AND WIFE, 9-11.

MANDAMUS.

Grounds. See HIGHWAYS, 3.

Sufficiency of return.

In a proceeding by *mandamus* to compel a street railway company to do certain repaving, if the relation did not plead any lawful change in the provision of the original franchise ordinance, a return averring the company's readiness to put the zone in question in good repair with the materials last used by the city to pave the same, as required by that provision, stated a good defense, it being presumed in support thereof that it is possible in that manner to create a condition of good repair. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 121

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MANDATORY STATUTES. See MUNICIPAL CORPORATIONS, 18.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE. DIVORCE.

Regulation: Preventing transmission of disease: Classification: Examination of applicant for license: Recognized tests: Constitutional law.

1. The state may control and regulate by reasonable laws the marriage relation, and may prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases which are liable to be transmitted to the spouse or inherited by the offspring. *Peterson v. Widule,* 641
2. A law directed against males only, for the purpose of preventing the transmission of venereal diseases, is based upon a valid classification and is not discriminatory. *Ibid.*
3. Sec. 2339*m*, Stats. 1913, requires every male applicant for a marriage license to be examined as to the existence in him of "*any* venereal disease;" then makes unlawful the issuance of the license if he fails to present a physician's certificate that he is free from "*acquired* venereal diseases" (the word "acquired" having been inserted by an amendment to the bill as first introduced); and then prescribes the form of such certificate, which form contains the statement that the applicant is free from "*all* venereal diseases." *Held,* that the confusion in the language will not prevent the court from giving effect to the clear intent of the legislature that the law should cover only *acquired* venereal diseases as that term is understood in medical science, and that the form of the certificate is to be construed as covering only such diseases. *Ibid.*
4. It must be presumed that in enacting said statute the legislature had a definite and certain end in view, that they did not intend to prohibit marriage, but intended rather to safeguard it by the use of practicable and reasonable means. *Ibid.*
5. Within the meaning of sec. 2339*m*, Stats. 1913, "clinical tests" of a disease are those which may be observed by the bedside or upon the general examination of the patient, not depending upon the use of instruments, apparatus, or chemical examinations; and "laboratory tests" are those which call for proofs by means of instruments, apparatus, or chemical reactions. *Ibid.*
6. In the provision of said sec. 2339*m*, Stats. 1913, requiring, as a prerequisite to the granting of the physician's certificate, physical examination and "the application of the recognized clinical and laboratory tests of scientific search," the words "recognized tests" are construed as referring to the tests recognized and used by the examiners empowered to make them, *i. e.* licensed physicians who are thirty years of age, and not to include a test—known as the Wassermann test—which, as the legislature is presumed to have known, is highly technical, difficult, and expensive, can be made by very few of the general practitioners of the state, and cannot be made for the statutory fee of $3. *Ibid.*
7. Said statute does not interfere in any respect with religious liberty. *Ibid.*

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8. The provisions in said statute for a trial before the county judge, without a jury, in case of a refusal of the certificate of health, afford sufficient protection to the applicant and do not involve any denial of due process of law. *Ibid.*

9. The fact that the fee of $3 fixed by the law for the examination is very meager is not a sufficient ground for holding the law unconstitutional. *Ibid.*

10. If the penalties provided by sub. 6 of said sec. 2339*m*, Stats. 1913, are extreme, that fact does not invalidate the other parts of the statute, such penalties not being an indivisible portion of the law nor forming in any sense a compensation for the other clauses. *Ibid.*

MASTER AND SERVANT.

The relation. See AUTOMOBILES, 3. INFANTS, 1, 2. LANDLORD AND TENANT, 1.

Discharge of servant: Notice: Justification.

1. A notice to an employee of his discharge, giving a reason therefor, does not preclude the employer from justifying such discharge upon another ground then existing, even though it was not then known to the employer. *Thomas v. Beaver Dam Mfg. Co.* 427

2. Any inexcusable substantial violation by an employee of instructions, or substantial neglect of duty, or any misconduct inconsistent with the relation of master and servant and which might injuriously affect the employer's business, regardless of any express agreement on the subject, constitutes good ground for discharging the employee. *Ibid.*

3. What constitutes sufficient ground for discharging an employee is matter of law unless provided for in the contract of employment; but where the facts are in dispute the case, under proper instructions, should be submitted to the jury. *Ibid.*

Master's liability for injuries to servant: General rules. See RAILROADS, 3-14.

4. The legislative purpose expressed in secs. 2394—48, 2394—49, Stats. 1911, was to impose upon the employer a liability for all injuries resulting from the hazards, risks, and dangers incident to the methods, processes, and conditions of the business furnished, permitted, or suffered by him, however obvious or open such hazards, risks, and dangers might be to the employee. *Besnys v. Herman Zohrlaut L. Co.* 203

Same: Unguarded machinery.

5. The duty imposed upon an employer by sec. 1636*j* and secs. 2394—41 to 2394—71, Stats. 1911, is that the place and the method of carrying on the business in which he is engaged shall be as safe as the nature thereof will reasonably permit as regards safety devices and safeguards, reasonably adequate methods and processes, and any other thing reasonably necessary to protect the life, health, safety, and welfare of the employee, and not to require, permit, or suffer an employee to go or be in any employment or place of employment which is not as safe as the nature of the employment will reasonably permit. *Besnys v. Herman Zohrlaut L. Co.* 203

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6. Where an employee in a tannery, working at an unhairing machine, lost his hand as the result of reaching over a wire guard or lattice attached to the machine and extending from ten to fourteen inches above the hide, for the purpose of adjusting the hide on the bolster, thereby bringing his hand in contact with a revolving knife cylinder, and it was stipulated upon the trial that such machine might have had an additional guard of chicken wire so attached that a person could not reach over and put his hand within the danger zone, it could not be held as a matter of law that the employer had complied with all his statutory duties. *Ibid.*

7. Sec. 1636*j*, as amended by ch. 470, Laws of 1911, which required that saws so located as to be dangerous to employees in the discharge of their duties be securely guarded or fenced, was not impliedly repealed by ch. 485, Laws of 1911, requiring the employer to furnish to his employees a place of employment as free from danger as the nature of the employment will reasonably permit. *Krueck v. Phoenix Chair Co.* 266

8. Although under said sec. 1636*j* the duty to guard is absolute and the exercise of ordinary care on the part of the employer cannot be deemed a compliance with such absolute duty, yet that statute is not to be construed to require such guarding of a machine as would prevent its operation, or the abandonment of it in case it cannot be securely guarded. The true meaning and intent of the statute is that the appliances shall be guarded or fenced as safely and securely as is possible consistent with their continued practical use. *Ibid.*

9. Mere difficulty, or inconvenience, or impracticability falling short of preventing the practical operation of a machine, however, is not sufficient excuse for failure to comply with the statutory duty. *Ibid.*

10. Whether or not it is possible to cover a circular saw so as not to interfere with its practical operation and at the same time so as to prevent the injury sustained, must in most cases be a question of fact for the jury. *Ibid.*

11. For this reason, in an action for an injury sustained in operating a circular saw used for cutting grooves in chair backs, it was error to exclude the testimony of a deputy of the industrial commission who qualified as an expert, to the effect that the saw in question had been examined by himself and other members of a committee appointed by the commission who had come to the conclusion that the saw could not be guarded and had made an order by which circular saws were excepted from the requirement of guarding while doing specific work which it would be impossible to do when the saw was guarded. *Ibid.*

12. There being nothing incredible or impossible in plaintiff's testimony that the accident occurred by reason of the lever which held the chair back in position escaping from the ratchet post in which it was fastened and flying upward, throwing his hand against the cutting edge of the saw, the question of his contributory negligence was for the jury. *Ibid.*

Same: Unsafe working place. See MASTER AND SERVANT, 5, 18–22, 25.

13. Plaintiff, the engineer in charge of a gas engine, was injured by a back-fire as he stood or was passing about four feet from the open end of the air intake pipe which had been temporarily

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lowered to about the level of his head while a new gas producer was being tested. Upon the evidence it is *held* that it was for the jury to say whether defendant failed to perform the duties imposed by sec. 2394—48, Stats. 1911, as to safety of the working place, whether such failure proximately caused the injury, and (the defense of assumption of risk having been abolished) whether plaintiff was guilty of any affirmative act constituting contributory negligence. *Jahn v. Northwestern L. Co.* 195

14. Error, if any, in that a question in the special verdict assumed that defendant permitted the intake pipe to remain temporarily where it was, was not prejudicial, it being undisputed that defendant permitted plaintiff to work about the open pipe in violation of said sec. 2394—48, and the jury having found that this fact proximately caused the injury. *Ibid.*

15. Secs. 2394—48, 2394—49, Stats., are a part of a new system relative to industrial accidents, by which it was intended to substitute, in lieu of the ordinary rule requiring the master to come up to the standard of reasonable safety as to working place and conditions, the absolute duty to make the employment and place of employment as safe as the nature of the employment will reasonably permit. *Sadowski v. Thomas F. Co.* 443

16. Since it would be very difficult to say, as a matter of law, when the physical conditions and acts requisite to satisfy the statute appear conclusively by the evidence, the question of the employer's compliance with the statutory duty must usually be for the jury. *Ibid.*

17. In an action for injuries to an employee who, while engaged in loading buckets of coal in the hold of a yessel, was struck by a piece of coal from a loaded bucket which unexpectedly dumped as it was being hoisted, it was a question for the jury, under the evidence, whether or not he was guilty of contributory negligence in stepping from the shelter of the deck out under the hatchway to resume his work before the bucket had in fact passed safely beyond the hatchway. *Schaut v. Barkhausen C. & D. Co.* 626

Same: Elevators.

18. In an action for injuries to an employee in a toy factory who was struck by a descending elevator, the question of his contributory negligence is *held* to have been one for the jury. *Athanasiou v. Garton Toy Co.* 280

19. Plaintiff, an elevator man in defendant's employ, while cleaning the pit of the elevator was struck and injured by the descending car which he, without authority, had placed in the temporary charge of another person. Upon the evidence, findings by the jury to the effect that plaintiff supposed and had reason to suppose that he was authorized to place such other person in charge of the elevator, and that such person in operating it was within the scope of his employment, are *held* to be wholly unsupported. *Houser v. Wisconsin C. Co.* 580

20. It further appearing conclusively that plaintiff had been expressly instructed not to go into the pit without first tying the brake rope so that the car could not be moved and that he wilfully violated such instruction, a finding by the jury that he was free from contributory negligence was clearly contrary to the evidence. *Ibid.*

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21. Plaintiff's testimony that he did not know how to tie the rope and that "it wasn't up to me to ask," did not show a sufficient excuse for his violation of express orders, defendant's superintendent having the right, in view of plaintiff's experience and familiarity with elevators, to suppose that he understood his instructions or, if not, would at least make his ignorance known. *Ibid.*

22. Plaintiff's working place and the appliances connected therewith, as he was ordered to use them, being safe, and he having wilfully and inexcusably violated his instructions without defendant's knowledge, the defendant is not liable for the consequent injuries. *Ibid.*

Same: Rules and regulations. See RAILROADS, 4, 5.

Same: Warning servant.

23. Where a fact which is a legitimate basic ground of a cause of action or defense is, specifically or inferentially, plainly pleaded and denied, or is raised on the trial by evidence and enters into the case to all intents and purposes the same as if pleaded, such fact is not evidentiary merely, but a fact in issue, and upon proper request should be submitted to the jury by an appropriate question in the special verdict; and denial of such a request is error. So *held*, where an allegation that defendant failed to warn plaintiff's intestate of the dangers of his working place was denied in the answer and there was evidence that the deceased had been warned of the danger and ordered not to work in the dangerous place. *Sadowski v. Thomas F. Co.* 443

Same: Fellow-servants. See RAILROADS, 7.

24. Since the enactment of the Workmen's Compensation Act the defense that an injury to a shop employee was caused by negligence of a fellow-servant is not available to a railway company under sec. 1816, Stats. *Salus v. Great Northern R. Co.* 546

25. Neither the common-law rule nor the statutory rule as to the duty of the employer to furnish a safe working place is applicable where the employees, in performing a simple and familiar operation, make their own working place, which is constantly changing. *Ibid.*

26. In an action for injuries to a shop employee whose hand was pinched as, with a fellow-servant, he was replacing a truck under the end of an ore car, it is *held* that the evidence does not warrant the disturbing of a verdict directed for defendant on the ground that the injury was a pure accident and that no actionable negligence was shown. *Ibid.*

27. In executing the simple ordinary movements required by performance of his duties, one servant may rightfully depend upon his fellow-servants to pay some heed to their own situation. *Ibid.*

Same: Assumption of risk. See RAILROADS, 7.

Same: Contributory negligence. See MASTER AND SERVANT, 4, 12, 13, 17, 18, 20. RAILROADS, 8, 9.

28. The defense of contributory negligence, though afterwards taken away, was available to an employer under secs. 2394—41 to 2394—71, Stats. 1911. *Besnys v. Herman Zohrlaut L. Co.* 203

29. The penalty imposed by sec. 2394—70, Stats. 1911, upon any person who should violate the provisions of, or do any of the acts

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prohibited in, secs. 2394—41 to 2394—71, was in the nature of a forfeiture, the purpose of which was merely to enforce compliance with the statute, and, although it was to be paid into the state treasury, did not make the acts criminal in their character and did not preclude the defense of contributory negligence in actions for personal injuries based upon noncompliance with the statute. *Ibid.*

30. Since the evidence in this case permitted the inference that plaintiff pursued the customary method and process of operating the machine at which he was working, when he reached over the guard to adjust the hide on the bolster, it could not be held as matter of law that he was guilty of contributory negligence. *Ibid.*

Same: Trial: Directed verdict.

31. In an action for injuries sustained, before the common-law rules were changed by statute, by an infant employee in a box factory, whose hand came in contact with a circular saw, a judgment for defendant upon a directed verdict is affirmed, it not appearing that the trial court was clearly wrong in holding that the evidence did not raise a jury question as to defendant's liability. *Tomscyk v. Badger B. & L. Co.* 360

Liabilities for injuries to third persons. See AUTOMOBILES, 3.

MATERIALMEN. See MECHANICS' LIENS.

MAXIMS.
In omnibus quidem, maxime tamen in jure, æquitas spectanda sit, 105.
Jus dicere, et non jus dare, 661.
Res judicata pro veritate accipitur, 576, 578.
Respondeat superior, 113–115, 117, 120, 533, 535, 538.

MEASURE OF DAMAGES. See CONTRACTS, 20–24. FRAUD, 6. RAILROADS, 11.

MECHANICS' LIENS.

Foreclosure: Parties: Cross-complaint: Bond of contractor: Liability of surety to owner and subcontractors.

1. In a statutory action by a materialman to foreclose a mechanic's lien, the owner, the principal contractor and his surety, and other lienors are all proper parties. *Yawkey-Crowley L. Co. v. De Longe,* 390

2. In such an action a cross-complaint by the owner, alleging in effect the giving of a bond by the contractor and surety conditioned for the faithful performance of the contract, the failure of the contractor to furnish the necessary materials and labor to complete the contract, that the owner was thereby compelled to provide the same at his own expense, and that the amount of the contract price remaining in his hands after the breach of the contract by the contractor is insufficient to compensate him for the damages sustained, states a good cause of action against the contractor and surety. *Ibid.*

3. To entitle a third person to maintain an action upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but there must be a promise legally enforceable. *Ibid.*

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4. Subcontractors furnishing labor or materials cannot maintain an action upon a bond given by the principal contractor to the owner, conditioned for the faithful performance of the contract, where neither the contract nor bond contains any express agreement to pay them, but the entire tenor of both instruments shows that the parties intended that the security should be for the benefit of the owner only. *Ibid.*

MEDICAL EXPERTS. See MARRIAGE, 3–6, 9.

MILWAUKEE CIVIL COURT. See APPEAL, 2–4. COURTS, 4, 6. JUDGMENT, 2. VENUE.

MINORS. See INFANTS. NEGLIGENCE, 4–6.

MISJOINDER. See PLEADING, 2, 7.

MISTAKE. See MUNICIPAL CORPORATIONS, 9.

MITIGATION OF DAMAGES. See SEDUCTION, 3.

MODIFICATION OF JUDGMENT. See DIVORCE, 5–7.

MORTGAGES.

Form and contents: Deed absolute in form: Security for debt.

1. A conveyance of land by deed absolute on its face, when given as security for a debt, is a mortgage. *Polly v. Gumney,* 362

2. Findings in this case to the effect that there was no sale of the land, but merely a conveyance of it to secure a debt, are *held* to be supported by the evidence. *Ibid.*

Foreclosure: Continued possession by mortgagor after sale: Status: Homestead.

3. The continued possession by a mortgagor, or a purchaser under land contract, of the premises described in the mortgage or contract, after foreclosure and sale under the mortgage, or after foreclosure of the land contract and lapse of the time allowed for redemption, resolves itself into a tenancy which is in subordination to the rights of the owner claiming under such foreclosure. *Youngs v. Wegner,* 489

4. Even if such mortgagor or purchaser, by remaining in possession and making payments after completed foreclosure, acquired a homestead right or interest in the premises, that in no way impaired the right of the legal owner to deal with the property as such, and he could make a valid transfer of his legal title and interest to a third person without the signature of the wife of such occupant, and such homestead right would be subordinate to the title so conveyed. *Ibid.*

5. Such a transfer does not involve any alienation by the husband of the property or any interest therein to which the homestead right extends, within the meaning of sec. 2203, Stats.; neither does a contract for sale of the land by the grantee of such legal owner to the claimant of the homestead right; and upon default of the latter to make the payments stipulated in such contract the rights of himself and wife may be barred by foreclosure. *Ibid.*

[6. Whether or not the land contract last mentioned should, under the facts and circumstances of this case, be given the effect of a mortgage for the purpose of foreclosure, is not decided, it being considered that the point, not having been raised in the trial court, was waived by the parties.] *Ibid.*

MULTIPLICITY OF ACTIONS. See PLEADING, 6.

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MUNICIPAL CORPORATIONS.

Governmental powers and functions. See PUBLIC UTILITIES, 10–13.

Ordinances. See CONSTITUTIONAL LAW, 5–8, 10, 11, 15. MUNICIPAL CORPORATIONS, 9, 13, 22–34.

Officers: Compensation. See CONSTITUTIONAL LAW, 6.

Same: Removal. See OFFICERS, 1–7.

Property. See PUBLIC UTILITIES, 4–7.

Public improvements: Widening streets: Assessment of benefits.

1. Sec. 925—167, Stats. 1911, providing for assessment of benefits and damages by reason of the condemnation of land for the widening of a street, does not authorize a city to assess benefits against any land unless the owner thereof also owns some portion of the land condemned. In the phrase "the benefits which will . . . accrue to *his* lands in the vicinity of the condemned land," the insertion, in the Statutes of 1898, of the word "his," which did not appear in the original enactment (sec. 167, ch. 326, Laws of 1889—which was specifically repealed), cannot be held to have been the result of inadvertence or mistake. *Pomainville v. Grand Rapids,* 384

2. Where, in such a case, there was an entire lack of jurisdiction on the part of a city to make any assessment against certain lands, executors of the estate owning such lands are not estopped to challenge the validity of the assessment by the fact that one of them, in his individual capacity, appeared before the board of public works and stated that he made no objection to certain assessments of benefits against his lands, none of which were taken. *Ibid.*

Same: Paving: Acceptance: Special assessments.

3. Where the board of public works of a city at first refused to accept a street pavement because not in compliance with the contract, but afterward, upon investigation and report by the city engineer, accepted it with a deduction of $2,400 to make good the difference in value between the pavement as laid and as contracted for, to which deduction the contractor agreed, this was a sufficient acceptance of the work upon which to base a special assessment against the abutting property. *Transfer Realty Co. v. Superior,* 587

4. The power vested in the board of public works to pass upon the question of performance of a contract for street paving necessarily gives to it authority to decide whether there has been substantial performance; and where there has been substantial performance acceptance of the work does not change the contract. *Ibid.*

5. Adjustments with a contractor for public work upon the basis of substantial performance, allowances being made for departures from literal compliance, are not compromises in the ordinary sense of the term, but are equitable and just and are binding where full benefits have been received under them. *Ibid.*

6. The validity of an acceptance of street paving by the board of public works is not affected by the fact that it was first recommended by the common council. *Ibid.*

7. *Chippewa B. Co. v. Durand,* 122 Wis. 85, and other cases relating to contracts made in violation of law, distinguished. *Ibid.*

Same: Repaving. See MANDAMUS.

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Same: Sidewalks: Board of public works: Determination, when conclusive: Mistake: Correction.

8. Where the board of public works of a city, acting within its authority, determines that a sidewalk is so out of repair that it should be replaced by a new one, such determination is conclusive if it rests upon any reasonable basis. *Van Valkenburgh v. Milwaukee,* 55

9. A city ordinance required that the sidewalk in a certain locality should be fifteen feet in width. The board of public works, in ordering a new sidewalk to be built by a contractor, did not specify its width but stated the area thereof, such area being sufficient only for a six-foot walk. The contractor actually constructed a fifteen-foot walk in conformity with the ordinance. *Held,* that the mistake in the order was a mere irregularity which could be corrected by the board of public works by providing for an assessment to cover the cost of the walk actually constructed. *Ibid.*

Same: Harbor improvements: Special assessments: Reassessment, when ordered.

10. Under sec. 925—248*a*, Stats. 1911,—providing that any city may "construct, repair, improve and maintain any harbor within or of the city, so as to make it navigable and available for the largest class of vessels,"—the improvements which a city may make either wholly or in part at the expense of the adjacent property must be made primarily for the purpose of improving the navigation of the harbor and not for the purpose of preventing encroachment by the water upon such adjacent property. *Boettger v. Two Rivers,* 60

11. That statute, when considered in its entirety, seems to contemplate somewhat extensive improvements to be made in accordance with a definite plan. *Ibid.*

12. Although by the terms of said sec. 925—248*a* a city is given the option to proceed under it in lieu of proceeding under secs. 925—240 to 925—248, it can do so only where the work contemplated is of the character provided for in said sec. 925—248*a*, to wit, the making of a harbor "navigable and available for the largest class of vessels," and not in all cases where improvements might be made under such earlier sections. *Ibid.*

13. A special assessment under sec. 925—241, charging to abutting lots the expense of building or maintaining docks, requires for its support a proceeding by ordinance and a demand upon the lotowner and failure on his part to do the work; and the section itself is of doubtful validity, since it seems to contemplate charging the expense of the improvement to the property owner regardless of benefits. *Ibid.*

14. Under sec. 925—248 a city may build a dock breakwater to protect land fronting on a harbor from being washed away, and may assess property benefited thereby, but it cannot build a commercial dock, if more expensive than a dock breakwater, and charge any part of such extra expense to the property so protected, or assess against such property benefits other than those resulting from the construction of a dock breakwater. *Ibid.*

15. Under said sec. 925—248 the common council must itself first fix the boundaries of the district to be assessed, which is not confined to lands immediately abutting on the improvement but

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may include all lands which will in fact be protected by it; and thereafter the assessment may be made by the board of public works and confirmed by the council. *Ibid.*

16. If the benefits do not amount to one half of the cost of the proposed improvement, the city cannot proceed under sec. 925—248, because it cannot levy to exceed one half the cost against the general property of the city. *Ibid.*

17. Where a special assessment for a dock breakwater is held void because the city failed to comply with the law in making it, and not because of any inherent lack of power in the city to make an assessment for the improvement in question, a reassessment should be ordered under secs. 1210*d*, 1210*e*, Stats.; but where the city had no power originally to make an assessment for an improvement of the character ordered, there can be no reassessment. *Ibid.*

18. The statute providing for a reassessment is mandatory, and where a case is within the statute and the city moves for a reassessment after the decision of the court is announced, it should not be concluded by a concession of counsel in a brief previously filed to the effect that if the assessment made was invalid no legal assessment could be made. *Ibid.*

19. Where all the proceedings taken plainly indicated, and the resolutions of the city council unequivocally declared, that a proposed dock was to be constructed for the purpose of improving the inner harbor of the city, the expense of such improvement could not be assessed against abutting owners under sec. 925—248. *Ibid.*

20. Even if, in such case, the declared purpose of the city council was not the real one, it should be bound by its declaration, and parol evidence (such as the testimony of the mayor and city engineer) was not competent to show that the purpose of the council was to build a breakwater to prevent the adjacent soil from being washed away. *Ibid.*

21. Nor, in such a case, could a subsequent city council be permitted to declare that the former council had in fact a different purpose in view from that which it said it had, and then proceed to make an assessment of benefits and damages on the strength of such declaration. *Ibid.*

Use and regulation of public places: Streets: Franchise ordinance: Keeping street railway zone in repair.

22. In case of doubt as to the nature of a provision imposing a duty upon a street railway company under a franchise ordinance enacted pursuant to sec. 1862, Stats., it is to be construed as a regulation rather than a contract. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 121

23. Sec. 1862, Stats., authorizing a city to grant the use of the streets for street railway purposes, and providing that "every such road shall . . . be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe," affects the construction of an ordinance enacted pursuant thereto to the same extent as if it were expressly written into the ordinance. *Ibid.*

24. In regulating the repair and improvement of its streets a city exercises a legislative function, and it cannot, without express authority from the legislature to do so, contract away its legislative power. *Ibid.*

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25. The specification in a franchise ordinance of the portion of the street which must be kept in repair by a street railway company may, perhaps, be the subject of contract, but a provision designating the kind of repair cannot be. The former relates to a matter in which permanence and unchanging policy are permissible; the latter to an exercise of legislative power in a matter which is necessarily subject to change from time to time. *Ibid.*

26. Practical construction by the city of a provision in the franchise ordinance regulating the mode of repair does not preclude it from prescribing new regulations by ordinance. *Ibid.*

27. The obligation imposed by a street railway franchise to keep a described portion of the street in good repair carries with it the duty to pave such portion when, having regard to the paving upon contiguous portions of the same street, paving is reasonably necessary to constitute good repair. *Ibid.*

28. A specification in such franchise of the use of certain kinds of paving materials for keeping the prescribed zone in repair necessarily implies repair by paving. *Ibid.*

29. A provision in such franchise that the street railway company shall keep in repair prescribed spaces between and beside the rails "with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs," is not contractual but is subject to the paramount provision that the company must keep the street in good repair and to the continuing power of regulation contained in sec. 1862, Stats. *Ibid.*

30. The words "same material" in such provision do not mean the identical blocks, brick, or asphalt, but the same kind of material, *i. e.* the same style of pavement. *Ibid.*

31. Where a street, originally paved by the city from curb to curb with one style of pavement, has been repaved, outside of the railway zone, with a different style of pavement, the right of the street railway company to use the old style of pavement in making repairs depends upon whether by such use the zone in question is or can be kept in good repair. *Ibid.*

32. The city ordinarily has the right to determine, within reasonable limits, what constitutes good repair; and it cannot deprive itself of that power. *Ibid.*

33. Where it is sought to compel a street railway company to repair the railway zone by repaving it with a new style of pavement, which has been laid by the city on the rest of the street, the common council, in the exercise of the power of regulation conferred by sec. 1862, Stats., should by ordinance (or perhaps by a resolution legally equivalent to an ordinance) prescribe the duty of the company in that respect. *Ibid.*

34. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 157 Wis. 121, followed in a case in which the railway zone had never been paved, it being *held* that when the city had paved the remainder of the street and the railway zone was not in good repair the street railway company might be compelled to pave its zone with a pavement of the same kind as that used by the city. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 139

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Torts: Change of grade for benefit of railroad: Eminent domain: Compensation: Trespass: Waiver.

35. The city of Milwaukee has ample power, under its charter, to change the grade of a street for ordinary street purposes by taking proper proceedings therefor, but not to enable a railway company to maintain its tracks in or across the street; nor can it make the railway company its agent for that purpose. *Pabst Brewing Co. v. Milwaukee,* 158

36. The facts that the city in the exercise of its police power required a railway company to elevate its tracks, and that it prepared plans for and supervised the work of the railway company in cutting down a street in front of plaintiff's property so as to pass under the tracks, did not render it a joint trespasser with the railway company. *Ibid.*

37. In such case the city possessed authority of a police character to supervise the railway company's operations, but the power to lower the street for such purpose was vested in the railway company alone by virtue of sub. 5, sec. 1828, Stats., subject to the obligation to restore the usable condition of the street and to make compensation for the land taken and the injury done. *Ibid.*

38. The fact that the city, without authority, commenced some proceedings purporting to be for the purpose of changing the grade of the street, obviously for the benefit of the railway company, did not affect the question of the city's liability. *Ibid.*

39. The lowering of the street some distance back from the railway right of way and in front of a lot which did not abut on such right of way, was a taking for railroad purposes, affording the lotowner the right to due compensation under the eminent domain statute. *Ibid.*

40. The competency of a railway company, under sec. 1828, Stats., to acquire land by the power of eminent domain is a continuing one, to be exercised from time to time to suit the exigencies of situations as they arise and have to be dealt with, and is not confined to the original construction. *Ibid.*

41. A property owner who knows of the cutting down of a street in front of his property for railway purposes and makes no objection until the work is completed, thereby waives the trespass and elects to rely upon the statutory remedy by appraisal of damages. *Ibid.*

42. Assuming the city to have been a participant with the railway company in the appropriation of the land, the waiver of the trespass necessarily extends to all concerned, leaving the owner no cause of action against the city of any kind and none against the railway company except under sec. 1852, Stats. *Ibid.*

Claims: Necessity of presentation before bringing action.

43. Sec. 925—58, Stats., providing that no action shall be maintained against a city "upon any claim or demand of any kind or character whatsoever" until the claim or demand shall first have been presented to the council and disallowed, does not apply to an action for equitable relief, even though full relief therein will include money damages. *Carthew v. Platteville,* 322

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NAVIGATION. See MUNICIPAL CORPORATIONS, 10–21.

NECESSARY PARTIES. See DEEDS, 4. PLEADING, 8.

NEGLIGENCE.

Acts and omissions constituting negligence. See ATTORNEY AND CLIENT, 2. AUTOMOBILES. BANKS AND BANKING, 1. FRAUD, 5, 6. INFANTS, 3. LANDLORD AND TENANT. MASTER AND SERVANT, 4–31. RAILROADS, 3–14. STREET RAILWAYS.

Same: Dangerous machinery: Corn shredders: Safety devices: Removal by purchaser: Liability of seller.

1. Under sec. 1636—131, Stats. 1911, the seller of a corn shredder is required to provide it with safety or automatic feeding devices, not only in front of the snapping rollers, but also in front of the husking rollers, so that the material, once fed into the machine, will be automatically carried along and taken care of, unassisted by the operator of the machine. *Derouso v. International Harvester Co.* 32

2. Said sec. 1636—131 makes it the absolute duty of the seller to *equip* the machine with the specified safety devices, and of the owner or operator to *maintain* them; and such devices must be reasonably adequate and efficient to perform the functions required of them. *Ibid.*

3. The duty to maintain being as absolute as the duty to equip, the owner or operator cannot detach the safety devices and, under a claim that they were useless, render the seller liable for an injury thereafter resulting. *Ibid.*

Degree of care required of a child: Contributory negligence.

4. Ordinary care in the case of a child is only such care as the great mass of children of his age, intelligence, and experience ordinarily exercise under the same or similar circumstances. *Quinn v. Ross Motor Car Co.* 543

5. It was prejudicial error, in instructing the jury, to apply to a boy thirteen years old, who was struck by an automobile in the street, the tests of ordinary care which are applied to adults. *Ibid.*

6. Testing the boy's conduct in such case by the rule applicable to children, the question of his contributory negligence was one for the jury. *Ibid.*

Gross negligence. See STREET RAILWAYS, 9–12.

7. Findings by the jury that the driver of an automobile, after seeing a boy in the street, failed to exercise ordinary care to avoid injury to him, and that such failure was the proximate cause of an injury to the boy, did not establish a case of gross negligence. *Quinn v. Ross Motor Car Co.* 543

Comparative negligence. See RAILROADS, 10.

Contributory negligence. See APPEAL, 8. AUTOMOBILES, 2. BANKS AND BANKING, 1. INSTRUCTIONS TO JURY, 3. MASTER AND SERVANT, 4, 12, 13, 17, 18, 20, 28–30. NEGLIGENCE, 6. RAILROADS, 8, 9. STREET RAILWAYS, 4–13.

Proximate cause of injury. See MASTER AND SERVANT, 13, 14. NEGLIGENCE, 7. PRIZE FIGHTING, 2.

8. In an action against the seller of a corn shredder for an injury to an employee of the purchaser, whose hand was drawn between the husking rollers when he attempted to dislodge ears

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of corn and refuse which had become clogged in the automatic feed to such rollers, it appearing that an automatic agitator, which was intended to stir up the material and align the ears as they dropped from the snapping rollers down upon said automatic feed, had become broken and had been removed by the purchaser, a verdict for the defendant was properly directed, even though it was claimed that such agitator was useless and even though its insufficiency be conceded, since, not being in use, its insufficiency cannot be said to have been the proximate cause of the injury. *Derouso v. International Harvester Co.* 32

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. GIFTS. PARTIES, 1.

NEW TRIAL.

Grounds: Newly discovered evidence. See COURTS, 6.

1. An affidavit by defendant in support of a motion for a new trial on the ground of newly discovered evidence as to a certain conversation between the parties, stating that affiant did not know of the existence of such evidence until after the term of court because the persons present had, most of them, moved away and "none of them had ever informed affiant of the facts as to such conversation until recently," did not sufficiently show the diligence required of the moving party in such a case. *Weichman v. Kast,* 316
2. The refusal of a new trial upon newly discovered evidence which is cumulative or impeaching in character rests largely in the discretion of the trial court. *Ibid.*
3. Newly discovered evidence which is merely impeaching in its character does not ordinarily form a ground for a new trial. *Walter Brothers B. Co. v. Kluck,* 388
4. Affirmance, on appeal, of a judgment of nonsuit does not affect the power of the trial court to entertain and decide an application for a new trial on the ground of newly discovered evidence. *Zimmerman v. Northern Pac. R. Co.* 514
5. Refusal to grant a new trial on the ground of newly discovered evidence was not an abuse of discretion where proper diligence to obtain such evidence before the trial was not shown, and especially where the evidence had only a remote bearing on the case. *Milwaukee Worsted Mills v. Winsor,* 538
6. A motion for a new trial on the ground of newly discovered evidence was properly denied where such evidence was merely cumulative. *Luebke v. Salzwedel,* 601

Proceedings to procure new trial. See APPEAL, 13.

NONRESIDENT. See GARNISHMENT, 2.

NONSUIT. See JUDGMENT, 2. NEW TRIAL, 4.

NUISANCES.

1. An action under sec. 3180, Stats. 1911, to abate a continuing nuisance and to recover damages for the injuries already suffered is an equitable action. *Carthew v. Platteville,* 322
2. The fact that two kinds of relief are asked for in such action does not render the complaint demurrable on the ground that several causes of action have been improperly united. *Ibid.*

NUNC PRO TUNC. See EQUITY, 4.

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OFFICERS.

Removal: Delegation of power.

1. Under sec. 7, ch. XIX, Milwaukee city charter,—providing that a majority of all members-elect of the common council shall have power to remove officers of the city for malfeasance in office and that the council shall provide by ordinance the manner of hearing and disposing of complaints against such officers,—such power of removal cannot be delegated by the council to another body nor to a committee of its own members. *State ex rel. Arnold v. Common Council,* 505

Same: Right to a hearing and information as to charges.

2. Under ch. 459, Laws of 1887, giving to the mayor of Milwaukee power to remove the inspector of buildings "at any time, in case he shall neglect to perform the duties of his office, or shall for any reason be incompetent to perform the same," such inspector cannot be removed without a hearing. He is entitled to reasonable notice of the charges against him, opportunity to be heard by his witnesses and himself and counsel, and an opportunity to know of the opposing evidence and to meet it, and to have the final determination rest on evidence that reasonably supports it. *State ex rel. Ringer v. Harper,* 421

3. In a proceeding for the removal of a city officer for cause, the substantial principles of the common law affecting private rights must be observed. The officer must be accorded the right to seasonably know the charges against him, the right to meet such charges by competent evidence, and the right to be heard by himself or by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto. *State ex rel. Arnold v. Common Council,* 505

4. The evidence in such a case may be taken by a committee of the council appointed for that purpose, and if read to the council before it acts upon the report of the committee will be deemed to have been taken before the council. *Ibid.*

5. But the right of the officer to be heard either personally or by his counsel before the common council itself, which body alone has the right to remove, cannot lawfully be denied, even though his counsel were allowed oral argument before the committee. *Ibid.*

6. The authority given by the charter to the council to prescribe the manner of hearing did not include power to suppress or destroy a substantial constituent element of the hearing; but the council may reasonably limit and control the length of time for oral argument. *Ibid.*

Same: Sufficiency of charges.

7. In the making of charges against an officer sought to be removed the accuracy of a legal pleading is not required, it being sufficient that it appears that he is thereby fairly informed of the general nature of the charge so that he can meet it upon the hearing. *State ex rel. Arnold v. Common Council,* 505

Compensation: Recovery of moneys illegally paid. See CONSTITUTIONAL LAW, 16.

8. Sec. 925—31c, Stats. (ch. 493, Laws of 1907),—providing that "no officer or employee receiving a salary from any city, whether organized under general or special law," shall receive any com-

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pensation other than such salary for services of any kind rendered to such city,—applies to all cities in the state, including Milwaukee. *Milwaukee v. Reiff*, 226

9. Where, in violation of sec. 925—31c, Stats., the city clerk of Milwaukee paid to a city officer or employee, who was at the time receiving an annual salary from the city, an additional sum for his services as an expert in preparing the tax roll, such sum is recoverable by the city, even though the services were performed outside of regular office hours. *Frederick v. Douglas Co.* 96 Wis. 411, distinguished. *Ibid.*

Liabilities. See SHERIFFS.

OPINION EVIDENCE. See MASTER AND SERVANT, 11.

OPTIONS. See CONTRACTS, 14, 16, 17, 22.

ORDINANCES. See CONSTITUTIONAL LAW, 5–8, 10, 11, 15. MUNICIPAL CORPORATIONS, 9, 13, 22–34.

PARENT AND CHILD. See STREET RAILWAYS, 13.

PAROL EVIDENCE. See CONTRACTS, 1. EVIDENCE, 6, 7. MUNICIPAL CORPORATIONS, 20.

PARTIES.

Proper and necessary parties. See DEEDS, 4. MECHANICS' LIENS, 1. PLEADING, 8.

1. When a final judgment is entered in this action determining and quieting the title to the securities in question, the debtors may safely act thereon and make payment to such parties as the court decides are entitled thereto, and the defeated claimants will be estopped from asserting any rights against them. There is, therefore, no apparent necessity for such debtors to be made parties. *Franke v. H. P. Nelson Co.* 241

2. The necessity of joining such parties not appearing on the face of the complaint, the defect, if there be one in that respect, should be taken advantage of by answer, as provided in sec. 2653, Stats. *Ibid.*

Joinder of parties. See APPEAL, 6. DEEDS, 3.

PARTNERSHIP.

Contribution: Illegal acts: Attorneys at law: Settlement of partnership affairs.

1. The principle that there can be no contribution between wrongdoers does not apply as between partners unless the partnership is an illegal partnership or unless the act relied on as the basis of the claim for contribution was not only illegal but the illegality such that it must or ought to have been known to the partner seeking contribution when the act was committed. *Estate of Ryan*, 576

2. Thus, where a firm of attorneys, acting honestly and in good faith though under a mistaken conception of the law, devised and carried out a settlement agreement between the parties to a will contest, whereby the estate was distributed otherwise than as provided in the will and the attorneys received certain sums for their services, but on appeal from a judgment giving effect to such agreement it was held that it was invalid and repayment of the sums received by the attorneys was adjudged,

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one of said attorneys who, after dissolution of the firm, repaid the entire amount was entitled to contribution from his former partners. *Ibid.*

3. Where one partner in a firm of attorneys was intrusted with the management of its financial affairs and all received their shares of the profits from him, their acceptance without question of the reports or statements submitted from time to time by him to them might constitute settlements; and where, after the firm had dissolved, one of its former members (not such manager) died, the testimony of a survivor that there had been a settlement of the partnership affairs did not necessarily relate to a personal transaction with such decedent. *Ibid.*

PAVING. See MUNICIPAL CORPORATIONS, 3–7, 24–34.

PAYMENT. See BANKS AND BANKING, 1.

PENALTIES. See MARRIAGE.

PERSONAL INJURIES. See APPEAL, 13. AUTOMOBILES. DAMAGES, 2–7. EVIDENCE, 1. HIGHWAYS, 4. INFANTS, 3. LANDLORD AND TENANT. MASTER AND SERVANT, 4–31. RAILROADS, 3, 14. STREET RAILWAYS.

PLEADING.

Complaint. See CONTRACTS, 11. LIBEL AND SLANDER, 2. NUISANCES, 2. PARTIES, 2. PLEADING, 1–3, 5, 7–10.

Answer. See HUSBAND AND WIFE, 10. PARTIES, 2.

Cross-complaint. See MECHANICS' LIENS, 2.

Demurrer. See CONTRACTS, 11. NUISANCES, 2. STREET RAILWAYS, 4.

1. Where the sufficiency of a complaint is challenged by demurrer every reasonable intendment must be made in favor of the pleading. *Pulp Wood Co. v. Green Bay P. & F. Co.* 604

2. Where a complaint attempts to state several causes of action and defendant demurs generally to the whole complaint, if any good cause of action is stated the demurrer must be overruled. *Ibid.*

Same: Misjoinder of causes of action: Defect of parties.

3. A general demurrer will not lie to a complaint which states any cause of action, legal or equitable. *Franke v. H. P. Nelson Co.* 241

4. To make a cause of action there must be a right in the plaintiff and a violation of such right by the defendant. *Ibid.*

5. A complaint alleging that one of the defendants, a piano company, sold pianos to various persons on credit, taking promissory notes therefor secured by collateral agreements, which notes and agreements (about forty-eight in number) it sold and delivered to plaintiff; that afterward it sold duplicate and triplicate copies of such collateral agreements to other defendants, who assert a paramount claim thereto, have collected money thereon, and have notified the purchasers not to pay the plaintiff; and that in some instances it has taken back the pianos, resold them, and taken new notes and securities which it has disposed of to still other defendants, is *held* to state a cause of action in equity to determine the title to the securities and to adjust the rights and equities of the parties in respect thereto and to the moneys collected thereon. *Ibid.*

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6. The prevention of a multiplicity of actions is sufficient to justify the resort to equity in such a case, the title of the parties, except the piano company, being derived from a common source, the matters in dispute being of the same nature and having a connection with each other, and all the parties being more or less concerned in the result. *Ibid.*

7. Such complaint states a single cause of action and is not open to the objection that several causes of action are improperly united, even though greater relief may be asked for than plaintiff is entitled to. *Ibid.*

8. A demurrer to such complaint on the ground that there is a defect of parties defendant in that the several makers of the contracts sold to plaintiff are not made parties, sufficiently particularizes the defect relied on, under sec. 2651, Stats., since plaintiff could readily ascertain from the contracts the names of such omitted parties. *Ibid.*

Same: Order for judgment.

9. Where, upon overruling a demurrer to the complaint, it was ordered that plaintiff "have judgment thereon, but with leave to the defendant to answer," this did not mean that upon defendant's failure to answer plaintiff could have judgment otherwise than according to law, *i. e.* after making due proof of the alleged cause of action. *Lotharius v. Milwaukee E. R. & L. Co.* 184

Amendment.

10. The denial of a motion, made during the trial, to amend the complaint so as to allege forgery of a deed to one of the defendants, was not an abuse of discretion, where the statements of fact in the supporting affidavit, if taken as true, had little tendency to prove the commission of a forgery, and a statement therein that the plaintiff expected to prove that one of the signers did not acknowledge the deed was not corroborated by affidavit of such signer, although he was plaintiff's principal witness on the trial and admittedly hostile to the defendants. *Hathaway v. Arnold,* 22

POLICE POWER. See CONSTITUTIONAL LAW, 4–15. HEALTH. MARRIAGE. MUNICIPAL CORPORATIONS, 36, 37.

POSSESSION. See ADVERSE POSSESSION.

PRESUMPTIONS. See ADVERSE POSSESSION, 4, 5. COSTS, 2. FRAUD, 3. MARRIAGE, 4, 6.

PRINCIPAL AND AGENT. See CONTRACTS, 14–22. EXECUTORS AND ADMINISTRATORS, 3. FRAUD, 3, 4. INFANTS, 1, 2. STREET RAILWAYS, 13.

PRINCIPAL AND SURETY. See INDEMNITY. MECHANICS' LIENS, 2–4.

PRIVILEGE. See PROCESS.

PRIZE FIGHTING.

Boxing exhibition: Action for death: Setting aside verdict.

1. In an action for death of plaintiff's intestate, which occurred while he was taking part in a boxing contest, findings by the jury to the effect that such contest was not a fight of the character forbidden by sec. 4520, Stats., nor a fight by mutual consent which would make each participant liable to the other for actual damages, are *held* to be supported by the evidence. *Parmentier v. McGinnis,* 596

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2. The trial court was justified in this case in refusing to set aside, on the ground that the jury were actuated by passion or prejudice, a special verdict which included a finding that the death of the plaintiff's intestate was not the proximate result of his taking part in the boxing contest, and the answer "Not any" to the question as to what amount of money would compensate his parents for their pecuniary loss occasioned by his death. *Ibid.*

PROCESS.

Service: Privilege. See APPEAL, 5.

A witness or a party from another state necessarily present and in attendance upon a court within this state, and present for such purpose only, is privileged from the service of a summons while so necessarily within the state; and a service made upon him under such circumstances is void. *Rix v. Sprague C. M. Co.* 572

PROPER PARTIES. See DEEDS, 4. MECHANICS' LIENS, 1. PLEADING, 8.

PROXIMATE CAUSE. See MASTER AND SERVANT, 13, 14. NEGLIGENCE, 7, 8. PRIZE FIGHTING, 2.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1-21.

PUBLIC POLICY. See CONSTITUTIONAL LAW, 1.

PUBLIC UTILITIES.

Purpose of public utility statute.

1. The Public Utilities Law was framed upon the theory that the duplication of plants for the carrying on of certain kinds of business was undesirable because it resulted in economic waste, the loss from which in the end usually fell upon the consumer; and in construing the act the apparent purpose of the legislature should be kept in mind. *Wisconsin T., L., H. & P. Co. v. Menasha,* 1

Railroad commission: Orders, when set aside: Evidence: Telephone companies.

2. An order of the railroad commission should not be set aside in an action brought under sec. 1797—16, Stats. 1913, unless it is shown by clear and satisfactory evidence to be unlawful or unreasonable. *Citizens Tel. Co. v. Railroad Comm.* 498

3. A finding by the railroad commission to the effect that the local service rendered by a certain telephone company in the city of Eau Claire was incidental to its rural and toll-line service and did not constitute it a public utility engaged in furnishing local telephone service to subscribers in that city, within the meaning of sec. 1797*m*—74, Stats., is *held* to be supported by the evidence. *Ibid.*

Indeterminate permits: Abrogation of existing franchises.

4. Ch. 596, Laws of 1911,—which provided that every franchise theretofore granted to a public utility by the state or any municipality was so altered as to constitute and be an indeterminate permit within the terms and meaning of secs. 1797*m*—1 to 1797*m*—108, Stats., and subject to all the terms, provisions, conditions, and limitations of said sections,—had the effect to abrogate a pre-existing franchise granted to a public utility by a city, at least so far as the provisions of the sections referred

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to were inconsistent therewith. *Wisconsin T., L., H. & P. Co. v. Menasha,* 1

5. By force of said act of 1911, sub. 3 of sec. 1797*m*—74, Stats.,—which prohibits any municipality from constructing a competing plant where there is a public utility already in operation under an indeterminate permit, engaged in similar service in such municipality, without first obtaining a certificate of necessity from the railroad commission,—became part and parcel of the franchise of a public utility then operating under authority of a municipality; and a provision in the municipal franchise whereby the city reserved to itself the right to do a commercial lighting business was abrogated. *Ibid.*

6. The abrogation of such provision did not violate the constitutional inhibition against impairing the obligation of contracts, and was valid. *Ibid.*

7. The legislature having power to enact such statute, the public utility is not estopped by anything contained in its former franchise, or by any waiver contained in its acceptance thereof, from claiming the benefit of any rights given by the substituted franchise. *Ibid.*

Acquirement by municipality: Assumption of liens: Liability for unpaid rent.

8. A municipality in which is a public utility operating under an indeterminate permit does not, in acquiring the property of such utility pursuant to secs. 1797*m*—80 *et seq.*, Stats. 1911, render itself liable for unpaid rent on a lease owned by such utility and acquired in the proceedings. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co.* 412

9. The statute limits the municipality strictly to the acquisition of the property of the public utility, and while this would permit the assumption of valid liens thereon up to the amount of compensation fixed by the railroad commission, other existing obligations must be liquidated by the public utility. *Ibid.*

Right of city to do commercial lighting: Certificate of convenience and necessity, when required.

10. A city in lighting its streets and public buildings performs a governmental function, while in supplying light to private consumers it performs a proprietary or private function. The two kinds of business are separate and distinct. *Wisconsin T., L., H. & P. Co. v. Menasha,* 1

11. Where a city was engaged in the business of public lighting only when ch. 596, Laws of 1911, went into effect, and another public utility was at the time engaged in the business of commercial lighting under a municipal franchise which reserved to the city the right to do a commercial lighting business whenever it chose, the city could not thereafter avail itself of such reserved right without first obtaining a certificate of convenience and necessity from the railroad commission, under sec. 1797*m*—74, Stats. *Ibid.*

12. The mere fact that the city had furnished a few lights to one private store building and one residence for a short time, the service being then discontinued because the city was unable to generate the necessary current, did not make the city a public utility doing a commercial lighting business, so as to exempt it from the provisions of sec. 1797*m*—74, Stats., where it had

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wholly ceased to do any private lighting for more than three years before the passage of the act of 1911. *Ibid.*

13. The facts that the city, when it constructed its street lighting system, intended at some future time to embark in the business of commercial lighting, that some part of the equipment (such as the poles) could be used in that business, and that prior to the passage of ch. 596, Laws of 1911, it had declared its purpose to enlarge its plant so as to enter that field, no funds having yet been provided or expense incurred therefor, did not take the case out of the statute so as to render a certificate from the railroad commission unnecessary. *Neacy v. Milwaukee*, 151 Wis. 504, distinguished. *Ibid.*

QUANTUM OF EVIDENCE. See INDEMNITY, 1, 2. INSTRUCTIONS TO JURY, 4, 5.

RAILROAD COMMISSION. See PUBLIC UTILITIES, 2, 3, 9, 11, 13. RAILROADS, 1, 2.

RAILROADS.

Amendment of charter. See CORPORATIONS.

Regulation: Stopping trains at milk stations: Railroad commission: Powers: Reasonableness of order.

1. Sec. 1801, Stats., requiring that certain passenger trains stop at all villages of 200 inhabitants, does not affect the power of the railroad commission as to the stopping of passenger trains, except in the cases which that statute specially covers. *Chicago, M. & St. P. R. Co. v. Railroad Comm.* 287

2. An order of the railroad commission requiring a railway company to establish a milk station at a crossing and stop its morning train at that place, should not be set aside as unreasonble where twenty-three farmers residing in the vicinity petitioned for the station and there was evidence that eighty to one hundred cans of milk and cream would be handled there, and that many farmers who send their milk to a creamery in the vicinity or are compelled to haul it a long distance to the station would ship from this crossing with a considerable saving on account of the shorter haul. *Ibid.*

Condemnation of land. See MUNICIPAL CORPORATIONS, 35–42.

Injuries to employees: Negligence: "Poling" cars.

3. In an action against a railway company for the death of a switchman, which occurred in the operation of "poling" a freight car, the evidence is *held* sufficient to sustain a finding of negligence on the part of the foreman in not directing the operation to be performed in the usual and ordinary way by stopping the engine as soon as the pole or timber was firmly braced between the engine and the car to be moved, so as to permit the man holding it to get out of the way, and by omitting to signal the engineer to stop when the timber was so braced. *Sweet v. Chicago & N. W. R. Co.* 400

Same: Flying switch: Violation of rules.

4. Any movement of a train in switching whereby, while the train is in motion, a part of it is cut off, increased speed given to the engine, the detached cars also kept in motion and following the engine at a less speed and allowed to run on to a switch track, has been understood to be a flying switch; and in this case there was sufficient evidence to sustain a finding that the movement of the train during which plaintiff's intestate was killed,

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though sometimes called a drop switch, was a flying switch within the meaning of a rule of the defendant company by which flying switches were forbidden except at spur sidings. *Hanson v. Chicago, M. & St. P. R. Co.* 455

5. The fact that a flying switch was made in violation of a rule forbidding it is sufficient to support a finding of negligence on the part of the conductor or engineer who was responsible for its being made. *Ibid.*

Same: Case governed by federal statute: Waiver.

6. In an action for the death of a railway employee, the objection that the decedent was employed in interstate commerce and hence that the case is governed by the federal statute is waived if not raised before or during the trial. *Hanson v. Chicago, M. & St. P. R. Co.* 455

Same: Assumption of risk.

7. Under the federal Employer's Liability Act, an employee does not assume the risk of a fellow-servant's negligence. *Sweet v. Chicago & N. W. R. Co.* 400

Same: Negligence of fellow-servants. See MASTER AND SERVANT, 24.

Same: Contributory negligence.

8. The fact that a subordinate employee did not give directions to his foreman as to the manner of performing a switching operation in which both were engaged, cannot be regarded as affirmative proof of contributory negligence. *Sweet v. Chicago & N. W. R. Co.* 400

9. The deceased cannot in this case be held to have been guilty of contributory negligence as a matter of law, either because he rode upon the engine instead of taking a position upon the ground while holding the timber with which the operation was to be performed, or because he selected for the purpose a timber which was only thirty-four inches in length. *Ibid.*

Same: Comparative negligence.

10. The question whether the negligence of a railway company or its agents contributed in a greater degree to produce an injury than the negligence of the injured employee, is peculiarly a jury question. *Hanson v. Chicago, M. & St. P. R. Co.* 455

Same: Damages.

11. In fixing the amount of damages for the death of an employee, under the federal Employer's Liability Act, the jury may take into consideration the ordinary probabilities in respect to future pecuniary benefits and support which apply generally in human relations, including reasonable expectation of benefits from gifts or inheritance. *Sweet v. Chicago & N. W. R. Co.* 400

Same: Federal liability statute: Procedure in state courts.

12. Where an act of Congress commits to the state courts the duty of trying cases arising thereunder, such cases may be tried according to the state rules of procedure. *Sweet v. Chicago & N. W. R. Co.* 400

Same: Instructions to jury.

13. In an action under the federal Employer's Liability Act to recover for the death of an employee, for the benefit of the widow and a dependent child, there was no error in instructing the jury that in fixing the amount of the damages they should include the value of the "support and protection" such widow

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and child would have received during the time the deceased would probably have lived,—the word "protection" being evidently used in the sense of pecuniary protection from want or penury. *Sweet v. Chicago & N. W. R. Co.* 400

14. Where a railway employee, fifty-two years of age, sober and industrious, who had accumulated only a homestead valued at $2,000, had customarily contributed from $90 to $100 a month to the support of his wife, aged forty-nine, and a dependent daughter aged twenty-two, an award of $4,000 to the widow and $1,000 to the dependent child was less than the real value of the support and maintenance of which they were deprived, so that the jury could not be presumed to have allowed anything on account of prospective gifts or inheritance, even if (because of there being no basis in the testimony to justify it) it was error to instruct them that they might consider prospective benefits of that nature. *Ibid.*

REAL PROPERTY. See ABATEMENT AND REVIVAL. ADVERSE POSSESSION. ARBITRATION AND AWARD, 1. BROKERS. CONTRACTS, 14–24. DEEDS. EASEMENTS. EQUITY, 7. EVIDENCE, 3, 4. FRAUD. HUSBAND AND WIFE, 6, 7. INSTRUCTIONS TO JURY, 2. MECHANICS' LIENS. MORTGAGES. SPECIFIC PERFORMANCE. TRESPASS. VENDOR AND PURCHASER.

REASSESSMENT. See MUNICIPAL CORPORATIONS, 17, 18.

RELIGIOUS LIBERTY. See MARRIAGE, 7.

REMOVAL. See OFFICERS, 1–7.

RENTS. See ABATEMENT AND REVIVAL. ARBITRATION AND AWARD, 1. WILLS, 4–6.

REPEAL OF STATUTE. See MASTER AND SERVANT, 7. STATUTES, 1.

REPLEVIN. See GIFTS. JUDGMENT, 2. SALES, 1.

REQUESTS FOR INSTRUCTIONS. See HUSBAND AND WIFE, 13.

RESCISSION. See DEEDS, 3–5. FRAUD, 5. SALES, 1.

RES JUDICATA. See JUDGMENT, 2, 3. PARTIES, 1.

RESTRAINT OF TRADE. See COMMERCE. CONTRACTS, 4–13. PUBLIC UTILITIES, 3, 5, 11–13.

RULES AND REGULATIONS. See RAILROADS, 4, 5.

RULES OF COURT.
Circuit Court Rule XXXIII (Direction of verdict: New trials), 531.

SALES.

Requisites and validity. See BILLS AND NOTES.

Rescission by seller: Fraud.

1. In replevin to recover goods on the ground that their sale by plaintiff was induced by fraudulent representations made by the vendee as to its solvency, the issue being as to whether or not the representations were made, and there being no claim that, if made, they were not made for the purpose of inducing the sale, there was no prejudicial error in submitting to the jury the question: "Did [the vendee] misrepresent to the plaintiff the material facts, knowing, or under such circumstances that it ought to have known, the truth, for the purpose of inducing the plaintiff to sell to it the property in question?" *Milwaukee Worsted Mills v. Winsor,* 538

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2. Nor was it misleading in such case to instruct the jury that the issue was whether the defendant "purposely" misrepresented the facts so as to induce plaintiff to part with the goods. *Ibid.*

SALOONS. See CONSTITUTIONAL LAW, 16. INTOXICATING LIQUORS.

SEDUCTION.

See BREACH OF PROMISE OF MARRIAGE. INSTRUCTIONS TO JURY, 7.

Civil liability: Exemplary damages.

1. In an action for loss of services of plaintiff's daughter by reason of her seduction, recovery is based upon a wilful wrong and exemplary damages are recoverable. *Luther v. Shaw,* 234
2. The jury in such a case having been properly given broad discretion as to exemplary damages to assess a sum which they deemed just and proper and best calculated to be an example to defendant and to others, the award, even though very large, cannot be held to show that the verdict was perverse and should not stand for any purpose. *Ibid.*
3. The fact that exemplary damages were recovered for the same wilful act in an action by the daughter for breach of promise of marriage, cannot be considered in bar or in mitigation of exemplary damages for the seduction in an action by the father for loss of the daughter's services. *Ibid.*
4. An award of $1,500 (reduced by the trial court from $5,000) as exemplary damages in such an action by the father, where the amount allowed as compensatory damages was so small as to indicate that nothing was allowed under that head for wounded honor or sensibilities, is allowed to stand although, had the trial court not reduced the award, this court would have reduced it still more. *Ibid.*

SELF-DEFENSE. See ASSAULT AND BATTERY.

SETTLEMENTS. See PARTNERSHIP, 3.

SHERIFFS.

Shooting to prevent escape of prisoner, when justified: Liability for assault.

1. Neither at common law nor under sec. 4366, Stats., is an officer justified in shooting at a person who, having been arrested on a civil warrant, is attempting to escape from his custody. *Gosczinski v. Carlson,* 551
2. Where an officer, under those circumstances, discharged his revolver in such a direction that the person attempting to escape was hit, he did so at his peril and, even though he did not intend to shoot such person, his act constituted an assault and rendered him liable for the injuries resulting from the shot. *Ibid.*

SIDEWALKS. See MUNICIPAL CORPORATIONS, 8, 9.

SIGNATURE procured by fraud, etc. See BANKS AND BANKING, 1, 2. CONTRACTS, 1.

SLANDER. See LIBEL AND SLANDER.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 1–3, 9, 13–21.

SPECIAL VERDICT. See APPEAL, 7–9. ASSAULT AND BATTERY, 1. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 14, 23. PRIZE FIGHTING, 2. SALES, 1. STREET RAILWAYS, 1. TRIAL, 4.

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SPECIFIC PERFORMANCE.

See CONTRACTS, 3.

In an action to compel specific performance of "preliminary agreements" for a ninety-nine year lease of a city lot brought more than a year and a half after negotiations had ceased and after the defendant owner had spent large sums on repairs and had given a ninety-nine year lease to another person, the trial court held that plaintiffs were entitled to specific performance, and prepared a lease which it held to be in conformity therewith. Such lease differed materially from any of the leases drawn by the parties and submitted to each other as above stated. *Held* that, even assuming that the minds of the parties had in fact met on the terms of the lease prepared by the court, plaintiffs were not entitled to relief, because their failure during the negotiations to state with substantial accuracy the terms of such lease was as much a breach of their obligation as was the owner's like failure a breach of his obligation. *Goldstine v. Tolman,* 141

STATES. See CORPORATIONS, 15. COURTS, 1. EQUITY, 1–3.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. HEALTH, 2. MARRIAGE. PUBLIC UTILITIES, 6.

Mandatory or directory? See MUNICIPAL CORPORATIONS, 18.

Repeal. See MASTER AND SERVANT, 7.

1. Repeals by implication are not favored, and where there is nothing inconsistent or conflicting in the statutes in question there is no repeal by implication. *Krueck v. Phoenix C. Co.* 266

Construction. See ADVERSE POSSESSION, 1. APPEAL, 12, 16. CONSTITUTIONAL LAW, 5, 16. CONTRACTS, 13. CORPORATIONS, 1–3, 5, 7–9, 11. COSTS, 1. COURTS, 4. DIVORCE, 5. EXECUTORS AND ADMINISTRATORS, 2. FALSE PRETENSES, 1. HIGHWAYS, 1. HUSBAND AND WIFE, 6. INSURANCE, 2, 3. INTOXICATING LIQUORS. MARRIAGE, 3, 5, 6, 10. MASTER AND SERVANT, 4, 5, 7, 8, 13–15, 24, 28, 29. MORTGAGES, 5. MUNICIPAL CORPORATIONS, 1, 10, 12–17, 19, 22, 23, 33, 37, 39, 43. NEGLIGENCE, 1, 2. NUISANCES, 1. OFFICERS, 1, 8, 9. PARTIES, 2. PLEADING, 8. PRIZE FIGHTING, 1. PUBLIC UTILITIES. RAILROADS, 1, 7, 13. SHERIFFS, 1. TAXATION, 2. VENUE. WORKMEN'S COMPENSATION ACT, 1, 2, 4, 5.

2. The ordinary rule as to construing legislation in derogation of the common law strictly against a purpose to change it, is not to be applied to efforts to create a new system for dealing with personal injuries to employees, but, the legislative purpose being clear to approach the ideal of affording compensation for loss in substantially all cases of accidental injury to employees in the course of their employment, the language of the statute, where open to construction, should be read liberally in favor of that purpose. *Sadowski v. Thomas F. Co.* 443

State and federal statutes: Employers' liability: Actions in state courts: Waiver: Procedure. See RAILROADS, 6, 12.

STOCK: Increasing capital stock of railroad company. See CORPORATIONS, 1–3, 8–15.

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STREET RAILWAYS.

Maintenance of tracks. See MUNICIPAL CORPORATIONS, 22–34.

Injuries to passenger: Special verdict: Inconsistent answers: Instructions to jury.

1. Where, in an action for injuries sustained in alighting from a street car, plaintiff's claim was that the car suddenly started forward with a jerk and threw him off, and defendant claimed that the injury was the result of a voluntary attempt to alight while the car was in motion, findings by the jury negativing both such claims were not inconsistent. *Walczakowski v. Milwaukee E. R. & L. Co.* 191
2. Plaintiff, having in such case failed to show that defendant was negligent as claimed, was not entitled to recover; and it was not necessary, in order to sustain a judgment for defendant, that the true cause of the accident should be established. *Samulski v. Menasha P. Co.* 147 Wis. 285, distinguished. *Ibid.*
3. Error, if any, in an instruction as to the place at which plaintiff had a right to have the car stopped was not prejudicial, because such instruction had no bearing on the finding that the car did not start forward with a sudden jerk. *Ibid.*

Injury to person on track: Contributory negligence.

4. In an action for personal injuries alleged to have been caused by defendant's negligence, where the complaint shows that plaintiff's automobile stopped on the east track of the defendant's street railway; that in attempting to adjust the mechanism so as to start it plaintiff stood on the west side of the automobile so near the west track that a car thereon could not pass without striking him; that there was nothing to prevent him from seeing an approaching car or from stepping aside to avoid it; and that as he stood facing south, a car on the west track coming from the north struck and injured him,—it is *held* that a demurrer to the complaint was properly sustained on the ground that plaintiff was guilty of contributory negligence. *Lotharius v. Milwaukee E. R. & L. Co.* 184
5. Ordinary care requires a person about to cross or drive upon a street railway track to look in both directions and listen for approaching cars at a point where it is reasonably certain that such efforts will accomplish their purpose, his duty in this regard being identical with that of a person approaching the track of a steam railway. *Kowalkowski v. Milwaukee N. R. Co.* 473
6. It is the duty of a person traveling along a street railway track to give way in due season to an approaching car, whether coming from the front or the rear, and to exercise ordinary care not only to discover when a car is approaching but to turn off from the track in time to prevent a collision. *Ibid.*
7. The question of ordinary care is generally a relative question, depending upon the facts surrounding each case. *Ibid.*
8. The evidence in this case is *held* not to show plaintiff's contributory negligence as a matter of law. *Ibid.*

Collision with vehicle: Gross negligence of motorman: Death of child: Contributory negligence of driver.

9. In an action for the death of a boy alleged to have been caused by gross negligence of a motorman whose car struck the buggy

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in which the boy was riding, the evidence—showing, among other things, that the horse attached to the buggy was under perfect control and had slowed up or stopped before reaching the track, and that the driver urged it upon the track immediately in front of the rapidly approaching car with the expectation of getting across ahead of the car—is *held* not to have warranted a finding by the jury that the motorman was guilty of gross negligence. *Kuchler v. Milwaukee E. R. & L. Co.* 107

10. The motorman had a right, under the circumstances, to presume that the driver of the horse, though only a few feet from the track, would stop and not make an effort to cross in front of the car. *Ibid.*

11. To constitute gross negligence in such a case the act or omission causing the injury must have been wanton or wilful. *Ibid.*

[12. Whether, although gross negligence was alleged and the case was tried as one based on gross negligence, plaintiff might have judgment upon the ground of ordinary negligence, is not determined.] *Ibid.*

13. Where parents had intrusted their infant child to the care of his grandfather, and he was driving the horse at the time a street car collided with the vehicle and caused the death of the child, the grandfather was the agent of the parents and his negligence was their negligence, defeating a recovery for their benefit on the ground of ordinary negligence on the part of the motorman. *Ibid.*

STREETS. See AUTOMOBILES, 1, 2. MUNICIPAL CORPORATIONS, 3–9, 22–42. PUBLIC UTILITIES, 10–13. STREET RAILWAYS.

SUBCONTRACTORS. See MECHANICS' LIENS, 4.

SUMMONS. See APPEAL, 5. PROCESS.

SUPREME COURT. See APPEAL. COURTS, 1–3.

SURVIVAL. See ABATEMENT AND REVIVAL.

TAXATION.

Constitutional requirements and restrictions. See CONSTITUTIONAL LAW, 15.

Assessment: Board of review: Changing assessor's valuation: Review: Certiorari.

1. The board of review cannot change the assessor's valuation without evidence; but if, in any reasonable view of it, the evidence furnished a substantial basis for the action of the board in making a change, and there is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts. *State ex rel. Althen v. Klein,* 308

2. The fact that a controversy relative to a decision of the board of review was submitted to the court under sec. 2788, Stats., does not change the rule of law as to the effect that must be given to such decision, and it must be sustained in that proceeding if it would be sustained on *certiorari.* *Ibid.*

3. Jurisdictional matters only can be reached on *certiorari*, and if on any reasonable view of the evidence it will support the conclusion arrived at, the board of review had jurisdiction to decide as it did. *Ibid.*

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[4. Whether the plaintiff (a taxpayer and the assessor who made the assessment changed by the board of review) had any right to institute a proceeding to question the validity of the action of the board, not determined.] *Ibid.*

TELEPHONE COMPANIES: Local service. See PUBLIC UTILITIES, 3.

TENANTS IN COMMON. See VENDOR AND PURCHASER, 1.

TRESPASS.

See ADVERSE POSSESSION, 3. ASSAULT AND BATTERY, 1. EASEMENTS, 4. MUNICIPAL CORPORATIONS, 36, 41, 42.

In an action to restrain continuing trespasses, brought by one claiming title to land by adverse possession, questions of fact only being presented and the findings of the trial court being fairly supported by evidence, the judgment for defendants is affirmed. *Cardine v. Schaffenbuhl,* 319

TRIAL.

Course and conduct of trial in general. See APPEAL, 11. INSTRUCTIONS TO JURY, 1. RAILROADS, 14.

Reception of evidence in general. See ASSAULT AND BATTERY, 2. BREACH OF PROMISE OF MARRIAGE, 1, 2. CONTRACTS, 1. EVIDENCE. HUSBAND AND WIFE, 11. MASTER AND SERVANT, 11. WORKMEN'S COMPENSATION ACT, 8, 9.

Same: Order of proof: Reopening case.

1. A motion to reopen the case, long after the parties had submitted their proofs, to enable plaintiff to offer newly discovered evidence upon the question whether one of the defendants was a *bona fide* purchaser of the land in question, is *held* to have been properly denied upon the showing made. *Hathaway v. Arnold,* 22

2. Whether a statement by plaintiff's counsel, in opening the case, of one of the facts which they intended to prove, should be received in evidence, when offered by defendant, as an admission of that fact on the part of the plaintiff, is not decided. Its exclusion in this case was not prejudicial error, since it was made a part of the record and defendant's counsel was allowed to comment on it in his argument to the jury. *Hanson v. Chicago, M. & St. P. R. Co.* 455

Arguments of counsel. See TRIAL, 2.

Questions for jury. See AUTOMOBILES, 1, 2. BANKS AND BANKING, 1. HIGHWAYS, 4. LIBEL AND SLANDER, 2. MASTER AND SERVANT, 3, 10–14, 16–18, 23, 31. NEGLIGENCE, 6. RAILROADS, 10. STREET RAILWAYS, 7, 8.

Same: Direction of verdict. See MASTER AND SERVANT, 26, 31. NEGLIGENCE, 8.

Instructions to jury. See APPEAL, 10. ATTORNEY AND CLIENT, 1. FALSE PRETENSES, 2. HUSBAND AND WIFE, 12, 13. INSTRUCTIONS TO JURY. NEGLIGENCE, 5. RAILROADS, 13, 14. SALES, 2. SEDUCTION, 2. STREET RAILWAYS, 3.

Same: Requests for instructions. See HUSBAND AND WIFE.

Same: Correction before jury retires.

3. Where, at the close of the charge to the jury, defendant's counsel, seeking to eliminate possible error from the record, called attention to a supposed inaccuracy in the charge in a statement

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of plaintiff's claims, and the same was immediately corrected, and plaintiff's counsel suggested no other inaccuracy, the error, if any, was cured. *Brennan v. Healy*, 37

General verdict. See BREACH OF PROMISE OF MARRIAGE, 1, 4. EVIDENCE, 6. SEDUCTION, 2.

Special verdict. See APPEAL, 7–9. ASSAULT AND BATTERY, 1. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 14, 23. PRIZE FIGHTING, 2. SALES, 1. STREET RAILWAYS, 1.

4. Failure to submit a material issue of fact on request may sometimes be cured by instructions, but a request for submission of a question covering a vital matter, and refusal thereof duly excepted to, will support an assignment of error for want of sufficient instructions, where those given do not cover the subject. *Sadowski v. Thomas F. Co.* 443

Setting aside verdict for perversity. See BREACH OF PROMISE, 4. PRIZE FIGHTING, 2. SEDUCTION, 2.

TRUSTS AND TRUSTEES.

Accounting: Survival of claim. See ABATEMENT AND REVIVAL.

Same: Compound interest.

A trustee who was diligent in his management of the trust property, rendered annual accounts of his receipts and disbursements, kept the beneficiary informed as to the state of the accounts, and paid her money whenever she called for it and in such amounts as she required, though chargeable with such interest as he received on balances, should not be charged with compound interest. *Estate of Hemphill*, 331

UNGUARDED MACHINERY. See MASTER AND SERVANT, 5–12.

VENDOR AND PURCHASER OF LAND.

Breach of contract by vendor: Settlement: Rescission. See FRAUD, 5, 6.

1. Where the vendees named in a land contract were not partners and would have become tenants in common if the contract had been consummated, one of them had no legal right, after a breach of the contract by the vendor, to settle with the vendor the claim of the other vendee for the recovery of purchase money paid by the latter. *Breen v. Arnold*, 528

2. Where the vendor in a land contract failed to furnish an abstract as agreed, was unable to deliver the deed as called for, and refused to comply with the terms of the contract, the vendee had a right to stand upon such breaches and recover the money which he had paid. *Ibid.*

Same: Failure to perfect title: Recovery of purchase money paid and deposited in escrow: Interest.

3. Where, under a contract for the sale of land made on August 24th, a part of the purchase price was paid to the vendor and the remainder was, by agreement, on August 30th deposited in a bank to be held, with the deed, until the vendor should perfect his title if he could do so within a reasonable time, otherwise to be returned to the purchaser, such reasonable time had elapsed prior to November 16th and, the title not then having been perfected, the purchaser could refuse to accept the deed and recover the money paid as well as that deposited. *Donovan v. Hoenig*, 250

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4. It appearing in such case that negotiations continued until some time in October and that if the title could then have been made good the purchaser would have accepted the deed, although he had theretofore demanded back the money, a recovery of interest on the amount deposited is allowed only from November 16th, the date of the commencement of the action. *Ibid.*

VENUE.

Under sub. 3, sec. 28, ch. 549, Laws of 1909, where a judgment of the Milwaukee civil court is reversed by the circuit court and a new trial ordered, such trial should be had in the circuit court. *Toledo C. S. Co. v. Polanis,* 312

VERDICT. See BREACH OF PROMISE OF MARRIAGE, 1, 4. EVIDENCE, 6. MASTER AND SERVANT, 26, 31. NEGLIGENCE, 8. PRIZE FIGHTING, 2. SEDUCTION. TRIAL, 4.

WAIVER. See CONTRACTS, 19. COURTS, 5. INDEMNITY, 3, 4. MUNICIPAL CORPORATIONS, 41, 42. PUBLIC UTILITIES, 7. RAILROADS, 6.

WARNING SERVANT. See MASTER AND SERVANT, 23.

WATERS AND WATERCOURSES. See ARBITRATION AND AWARD, 1.

WEIGHTS AND MEASURES. See CONSTITUTIONAL LAW, 4–15.

WIDOW'S ALLOWANCE. See EXECUTORS AND ADMINISTRATORS, 1.

WILLS.

Probate: Contest: Attorney's fees. See EXECUTORS AND ADMINISTRATORS, 4.

Construction: Adopted child not a "child."

1. The rule that the purpose of the testator is to be strictly carried out if it can be fairly gathered from the language used, in the light of the entire instrument and the characterizing circumstances, applies in determining whether a provision in a will for the "child" of another refers to an adopted child as well as a child of the blood. *Will of Mitchell,* 327
2. In this case an adopted child of the testator's son is *held* not to be a "child" of such son within the meaning of the will. *Ibid.*
3. The precise meaning intended by a testator in using a particular expression is a matter of fact to be solved from evidentiary inferences, and the result reached by the trial court, if consistent with correct principles of law, will not be disturbed on appeal unless clearly wrong. *Ibid.*

Same: Devise of rents.

4. Where a will devised to the testator's widow the rents of his farm during her natural life, she was entitled to such rents from the date of his death, although he had leased it before his death for a term which had not expired and taken notes for the entire rent. *Estate of Hemphill,* 331
5. In such case the rent should be apportioned by allowing the estate the amount which had accrued prior to the death of the testator. *Ibid.*
6. A will devising to testator's widow the rent of his farm for life, subject to a certain annual charge, directing the conversion of the residue of his estate, and providing that the executor might, out of any moneys in his hands, pay to the widow any sum she might need "more than her share of the rent from the

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farm for her support and maintenance, . . . and at the death of my said wife both the residue of said money and credits is to be divided by my said executor among my four sons . . . who are also to have all and any residue of my estate not otherwise disposed of herein," entitled the widow to the entire rent from the farm, subject to the charges named, although more than sufficient for her support; and any portion of such rent which had not been paid to her belonged, after her death, to her estate, not to that of the testator. *Ibid.*

WITNESSES.
Attendance: Privileges. See PROCESS.
Competency. See HUSBAND AND WIFE, 11. MASTER AND SERVANT, 11. PARTNERSHIP, 3.

WORDS AND PHRASES.
Amendment, to charter of corporation. See CORPORATIONS, 6, 7, 10.
Child, in will. See WILLS, 1, 2.
Claim or demand, in statute. See MUNICIPAL CORPORATIONS, 43.
Clinical tests, in statute. See MARRIAGE, 5.
Collision, in policy. See INSURANCE, 1.
Commercial lighting business. See PUBLIC UTILITIES, 12.
Completed sale, in contract. See CONTRACTS, 17.
Compromise. See MUNICIPAL CORPORATIONS, 5.
Employment, in statute. See WORKMEN'S COMPENSATION ACT, 1.
Fact in issue. See MASTER AND SERVANT, 23.
Facts. See FALSE PRETENSES.
Flying switch. See RAILROADS, 4.
For the purpose of rafting and boomage, in deed. See EASEMENTS, 4, 5.
Gross negligence. See STREET RAILWAYS, 11.
Laboratory tests, in statute. See MARRIAGE, 5.
Local telephone service, in statute. See PUBLIC UTILITIES, 3.
Main traveled highway, in statute. See HIGHWAYS, 2.
Necessaries. See INFANTS, 2.
Plaintiff, in judgment. See JUDGMENT, 1.
Procuring cause of sale. See BROKERS.
Protection, in instructions to jury. See RAILROADS, 13.
Reasonable rules and regulations, in statute. See MUNICIPAL CORPORATIONS, 23–33.
Recognized tests, in statute. See MARRIAGE, 6.
Restraint of trade, in statute. See CONTRACTS, 6.
Same material, in city ordinance. See MUNICIPAL CORPORATIONS, 30.
Securely guarded or fenced, in statute. See MASTER AND SERVANT, 8.
Summary application made after judgment, in statute. See APPEAL, 5.
Taking for railroad purposes. See MUNICIPAL CORPORATIONS, 39.
Valid to the same extent as between other persons, in statute. See HUSBAND AND WIFE, 6, 7.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT, 4, 5, 7, 13–15, 24, 25, 28, 29, 31. STATUTES, 2.

Definitions: Employment.

1. Operating a drill press is an "employment" within the meaning of sec. 2394—10, Stats. 1911. *International H. Co. v. Industrial Comm.* 167

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Industrial commission: Hearing: Evidence taken without notice: Rebuttal.

2. Sec. 2394—16, Stats. 1911, provided for a full and fair hearing upon the merits, and this necessarily included the right of both parties to know what the testimony taken without notice tended to prove; and the law clearly contemplated that the parties should have the right to meet any new matter. *International H. Co. v. Industrial Comm.* 167

Same: Findings must be based on evidence.

3. The findings of fact made by the industrial commission must have some support in the evidence, and such evidence must be made a part of the record which is returned to the circuit court for review. *International H. Co. v. Industrial Comm.* 167

4. To find essential facts which have no support in the evidence is outside of or in excess of the powers of the commission, and under sec. 2394—19 is ground for setting aside its award. *Ibid.*

Permanent partial disability: Evidence.

5. Under sec. 2394—10, Stats. 1911, no compensation could be awarded to an injured employee for permanent disability unless there was "impairment of his earning capacity in the employment in which he was working at the time of the accident." *International H. Co. v. Industrial Comm.* 167

6. An injury to a drill-press operator resulting in material impairment of the sight of one eye was a sufficient ground for awarding compensation as for a permanent partial disability, although the injured employee was taken back by the employer as soon as he was able to work, and was able to earn as much as before in the same employment, if in fact manufacturers operating drill presses would be less likely to hire him because of his injury or disfigurement. *Ibid.*

7. A finding by the industrial commission in this case that, although the partial loss of the sight of one eye had not impaired the ability of a drill-press operator to do a full day's work in that occupation, yet that there was a permanent partial disability because, on account of such partial loss of sight, employers would be less likely to hire him, is *held* not to be supported by any evidence. *Ibid.*

8. A bulletin of the commission containing statements by forty-nine persons who had lost the sight of one eye, three fourths of whom stated that their injury had no effect on their earning capacity and none of whom stated that such an injury would affect the earning capacity of a drill-press operator, and showing that thirteen of such persons were asked whether they had been discriminated against in the matter of securing work and but one (whose ambition was to become a railroad man) gave an affirmative answer—did not tend to support the finding above mentioned. *Ibid.*

9. Statutes and legislative and administrative rules of other states, rulings of the United States pension board, and an award by the industrial accident board of another state—all of which the industrial commission stated that it had considered in reaching its conclusion, but which were not made a part of the record—did not constitute evidence on which the finding of fact could rest. *Ibid.*

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